Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

POLARIS INSURANCE COMPANY, LTD., a foreign corporation,

Petitioner

AQUA-MARINE CONSTRUCTORS INC., an Oregon corporation,

Respondent

Petition for a Writ of Certiori to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case and are: POLARIS INSURANCE COMPANY, LTD. Petitioner and AQUA-MARINE CONSTRUCTORS, INC. Respondent 2. MIKE BANKS AND MIKE BANKS TOWING Defendant.

Pearcy Marine and Pearcy and Latham Smith and The M/V Garnet Banks and The M/V Elizabeth are also named in the caption but have not been served. Defendant Polaris Insurance Company was served with Aqua-Marine's motion for order to post collateral, the subject of this Writ, soon after filing its answer and Cross and Third Party Actions.

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Polaris requested a thirty day extension of time to file its application for a writ of certiorari. Said motion was granted on July 21, 1997.

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B OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON DATED DECEMBER 4. 1993

C ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON DATED AUGUST 1. 1994

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E ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON DATED AUGUST 1. 1995

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G ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON DATED SEPTEMBER 6, 1995

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SUPREME COURT OF THE UNITED STATES

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POLARIS INSURANCE COMPANY, LTD.

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Petition for Writ of Certiori to the United States Court of Appeals for the District of Oregon

FOR PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the court of Appeals is reported at 110 F.3d 139 and is reproduced in Appendix a. The unreported opinions of the District Court are reproduced as Appendices b, c, and d

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on March 28, 1997. The Jurisdiction of this court is invoked under U.S.C. § 1254(1).

Statutes involved are: O.R.S. 731.194, O.R.S. 746.340(1)(b) O.R.S 746.320(2); O.R.S. 746.360(1); O.R.S. 746.340; O.R.S. 746.320(2); O.R.S. 746.320(2)(a) O.R.S. 731.354; O.R.S. 731.066(2); O.R.S. 731.186 and O.R.S. 731.174.

STATEMENT OF THE CASE

Plaintiff, Aqua-Marine Constructors, Inc. (Aqua-Marine), is the owner of an ocean-going cargo barge known as Aqua 242, which is "home-ported" at Portland, Oregon. On or about May 16, 1992, Aqua-Marine and defendant Mike Banks, dba Mike Banks Company (hereinafter, Banks), entered into a bare-boat charter agreement for the chartering of the barge, Aqua 242 (the charter agreement). Under the terms of the charter agreement, Banks provided Aqua-Marine with a performance bond, guaranteeing performance of the payments and the redelivery of the barge pursuant to the requirements of the charter agreement. At the request of Banks, defendant Polaris Insurance Company, Ltd. (Polaris) issued the performance bond to Banks with Aqua-Marine as obligee. Banks never took possession of the barge but instead it was delivered to Latham Smith without notice to knowledge of or approval by Polaris The barge was arrested in Mobile,

Alabama. Banks failed to pay rent to Aqua thereon nor the towage to Smith.

The performance bond contains the following special provisions to guarantee to the Owner that such re-delivery requirements are met. Failing which, the Surety will perform on the re-delivery at page 1

> "The condition of this performance bond is for the re-delivery of the subject chartered barge Aqua 242 to the Owner, and this bond is to guarantee to the Owner that such re-delivery requirements are met. Failing which, the Surety will perform on the re-delivery, up to the specified amount of this guarantee bond. This bond is in accordance with Article 19 of the subject Contract"

> "2. Whenever Charterer shall be and declared by the Owner to be in default under the Contract the Owner having performed its obligations thereunder, the Surety shall, if requested in writing by Owner either:
>
> (i) Promptly remedy the default
>
> or -
>
> (ii) Promptly complete the Contract in accordance with its terms and conditions.
>
> (iii) Obtain a bid or bids for submission to the Owner for completing the Contract in accordance with its terms and conditions, . Bond page 2. ¶¶ 2 & 3

The bond clearly states at Page 2 paragraph 3:

"3. Any suit under this bond must be instituted before the expiration from the date on which final payment under the contract falls due, [the] Contract [is] incorporate[d] into this bond by reference."

Paragraph 5. of the "bond" recited:

Whereas the Charterer has pledged specific collateral as a consideration of the Surety the "bond" it is understood and agreed that in event of a loss or default under the terms of this "bond", the Surety's liability to the Owner is limited to the value of the collateral enumerated in the collateral agreement.

Paragraph 7. of the "bond" recited

7. "bond" premium must be remitted in full for continuation of all provisions of the bond and collateral must at all times (remain) with Surety for continuation of the bond.

Aqua demanded that Polaris rescue the barge and return it to Everett, Washington and that Polaris pay said rent in arrears.

Polaris refused to perform citing failure of consideration by Banks, failure of consideration; failure to pay the bond premium, and failure to deposit the agreed collateral.

The performance "bond" in the sum of $100,000 was further limited to the collateral pledged which was zero, (0).

In September 1992 Aqua-Marine sued both Banks and Polaris in the District Court for the District of Oregon alleging Diversity Jurisdiction. Polaris answered cross-complained for fraud and sued Banks and others as third party defendants in Admiralty Jurisdiction.

Oregon insurance statutes required an insurance carrier not admitted to do business in Oregon to become admitted or to deposit funds into court to guarantee payment of any future judgment before filing any defensive action. Plaintiff moved for such an order Polaris opposed. The court granted Aqua's motion Polaris refused to make said deposit and on August 1, 1994 was cited for contempt. On September 7, 1995 the district court granted Aqua-Marine's motion for summary judgment, and entered judgment in favor of Aqua-Marine and against Polaris and Banks. On October 3, 1995 Polaris instituted this appeal from the judgment in the district court.

Polaris assigned error on the district court's choice of laws and its construction of several Oregon Insurance Statutes Since the assignments of error were on purely legal questions the 9th Circuit ruled de novo thereon. Brannan v. United Student Aid Funds, Inc., 94 F.3d 1260, 1263 (9th Cir. 1996) and reviewed the statutory construction de novo. Jenkins v. Whittaker Corp., 785 F.2d 720.

REASONS FOR GRANTING THE WRIT

This is a case of first impression in that it is the party who drew the contract that made the choice of law and imposed it upon the others who now seeks to disavow it.

Despite this court's ruling in M/S Bremen and Unterweser Rederei GmBh, Petitioners v. Zapata Off-shore Company, 406_407 U.S. 1 (1975) [In Admiralty], there is a still a split of authority regarding the parties right to choose the law that will govern their contract, their right to choose the forum and the enforceability of that choice.

Consideration of this case before the Supreme Court of the United States will bring Oregon into the age of global trade. One need only walk around the center of Portland, the capital

of Oregon, to see the hundreds of unoccupied buildings and review the vitality of the shipping industry of the State of Washington as distinguished from Oregon. Protectionism, through tariffs parochialism, home towning, favoring the resident and making the foreigner destructive of trust. Trust is the basis of all trade vital to both local and national economy. A man is only as good as his word. States are only as good as their laws are clear, fair and evenhandedly applied regardless of race, religion, nationality, identity of person or his country of residence. Oregon and the plaintiff may win this battle with Polaris but as the process repeats itself, as it should according to the doctrine of stare decisis, it will pay are, in the long run, lose the vital "trade war" with the rest of the world.

PREEMPTION

Aqua-Marine contends that the Oregon Insurance Code is applicable, and therefore Polaris was required to deposit collateral with the court prior to filing any pleading in this case. Polaris contends that the claim of Aqua-Marine on the performance "bond" issued by Polaris is subject only to the admiralty jurisdiction of this court, rather than to diversity jurisdiction, that federal maritime law applies rather than the Oregon Insurance Code and that application of Federal Maritime Law would hold that the "Performance Bond is a maritime contract and there is Admiralty Jurisdiction.

Polaris further contends that if the court rules that the Oregon Insurance Code applies, Polaris is not required to deposit collateral under ORS. 746.340 because:2) the performance "bond" issued by Polaris is "wet marine and transportation insurance" under ORS. 731.194, the bond is exempt from the other provisions of the Oregon Insurance Code therefore Polaris need not deposit collateral with this court.

For purposes of this appeal Polaris contends that the OPINION of The District Court Constituted Abuse of Discretion. Was Prejudiced and was Clearly Unsupported By the Evidence

The United States Court of Appeals for the 9th Circuit partially agreed with the Polaris contentions ruled that Polaris was correct in that its contract was indeed a maritime contract. See n 5. While federal court sitting in diversity applies choice-of - law rules of the forum federal court sitting in admiralty must apply federal maritime choice of law rules.

Polaris had based its argument within the rule of Wilburn Boat and citations of Benedict on Admiralty which cited Cases decided in the Federal Courts. The 9th Circuit opinion relied on many of Polaris' citations.

The next issue is, based on that ruling, whether the state insurance statutes cited are preempted.

WHAT IS THE EFFECT OF THE NAME OR LABLE GIVEN TO CONTRACT;

What a contract is styled or labeled by the parties does not determine its character or their legal relationship nor is the name given to a contract determinative in its construction. Although the name given by the parties must be considered in order to ascertain the meaning and nature of a contract, the greater weight must be given to the operative contractional clause of the agreement. In determination of the real character of a contract, courts will look to its purpose rather than the name. See Heryford v. Davis, S.Ct. Oct.1880, 235 at 243-244.

The 9th Circuit itself has ruled that the instrument is not a surety bond but rather a maritime contract in the context of its effect and not merely the title addressed to it.

Wilburn Boat v. Firemen's Fund Insurance Co. is in accord with Polaris' claim that the general maritime law rather than state law should control the incidents of this "Maritime Contract" because its nature and classification is established by application of judicially established federal and general maritime law. See Wilburn Boat v. Firemen's Fund Insurance, 75 S.Ct Rptr. (1995) at page 370. Wilburn Boat cites Garrett v. Moore-McCormack Co., 317 U.S. 239; 63 D.Vy. 246 The Supreme Court has fashioned a large part of the existing rules that govern admiralty. And States can no more override such judicial rules than they can override acts of Congress. Therefore if there exists a judicially established federal admiralty rule governing [(these warranties) as was the issue in Wilburn Boat] the nature of this contract [(as being maritime or not) as is the case herein] state law cannot override that classification and such classification must be applied in preference over all state law.

! Graciously, the concurring opinion credits Polaris' position in that "this is one of those close cases." And astutely examines the practical effects of imposing the deposit into court.

DID THE 9TH CIRCUIT PROPERLY APPLY THE RESTATEMENT TO THE FACTS HEREIN

Can a commercial barge lessor in the state of Oregon freely determine or chose the forum and its laws by contract that itself writes and imposes upon the lessee and an insurer and when it finds that it is more convenient and advantageous to its purposes unilaterally disavow that choice in order to gain the advantage of another forum being that of its residence?

In resolution of this issue the 9th Circuit relied on the Restatement. However, the 9th Circuit chose to apply only

part of the Restatement to the facts herein ignoring the facts particular to, and distinctive of this case.

According to the Restatement of the Law of Contracts Section 193 re: Contacts of Fire, Surety or Casualty Insurance: It of interest to note that the Restatement does not distinguish Maritime Insurance which the 9th Circuit concedes is not a domestic risk. (Emphasis added.)

Polaris denies that the contract herein is merely surety in nature. For purposes of this analysis in testing the court's fair and equitable application of the Restatement to the facts herein. In so doing the court must respect its own conclusion in application of the Restatement.

> "The validity of a contract of fire, surety, casualty insurance and he rights created thereby are determined by the local law of the state which the parties understood was to be the principle place of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in section 6 to the transaction of the parties, in which event the local law of the other state will be applied."

In particular, comment e. to this section is instructive:

> "e. Choice of law of the Parties. Effect will frequently be given to a choice of law provision in a contract of fire, surety or casualty insurance which designates a state whose local law gives the insured less protection than he would receive under the otherwise local law for the same reasons that effect is not given to such a a choice of law provision in a life insurance contract (see section 192, Comment e). Effect is more likely to be given such choice of law provision in a situation where

the insured enjoys a relatively strong bargaining position ... and particularly where in where in addition one or more risks are located in the state of the chosen law."

The 9th Circuit failed to recognize the appropriate Restatement sections are sections 193, Contracts of Fire, Surety and Casualty Insurance and 194, Contracts of Suretyship which deal with sureties and surety bonds rather than 188.

In Restatement of the Law, section 194 at c.

"... A sufficient relationship to justify application of the law governing the principle obligation (the law of Washington was chosen to govern the charter party agreement and the principal obligation) was (1) the state where the creditor extended the credit to the principal. The act constituting extension was done in Washington when Aqua turned the barge over to Banks and where Banks turned the barge over to Smith. The Barge is personalty, located in Washington, the state where the Polaris Contract, and the Bare Boat Charter's principal obligation, return of the barge, was to be performed. (2) The state where the contract of the surety was to be performed [Washington] (3) The state in which the negotiations between the surety and the creditor were conducted. [There is no single state.] (4) The state of the domicile of the creditor of the creditor or the surety. Aqua and Polaris are domiciled in different countries let alone different states."

Those listed first in order are preferred over the latter recommendations.

In most cases the courts have applied the law of the principal obligation. Section 194 at page 619

The law of the principal obligation is Washington according to the terms of the contract as designated so by Aqua's free, informed and conscious choice and designation.

Application of the local law, Washington, where the creditor extended the credit, where the security agreement was to be performed, Washington, dispenses with the requirement of posting the collateral.

The facts in this case show that Aqua-Marine had all the bargaining power and gave Polaris its duties on a "take it or leave it" basis.

Although the choice of law facts in this case are clear and undisputed that Aqua wrote the contact that was insured by Polaris and that Aqua designated the State of Washington as the state of local law to control the bare boat charter the District Court and 9th Circuit is court failed to recognized them. If Polaris steps into Banks shoes, as found by the 9th Circuit, it should be entitled to the full measure of Banks' rights including Banks reliance and resort to Washington law. It is inherently unfair and a failure of equal protection of the law to permit a party he freely and consciously made an informed choice of law which he considered to be to his best advantage at the time the choice was made and while it was represented by competent and prestigious counsel and then to disregard that choice after the cause of action arises.

St. Paul Ins. Co. v. Great Lakes Turnings, Ltd., 829 F.Supp. 982 (N.D. I11. 1993) is instructive. The Court decided that Illinois did not have a substantial and legitimate interest in applying its regulatory scheme basing its opinion upon the dual consideration that the Illinois Insurance Code exempted ocean (Wet) marine insurance and that Illinois had no interest in this international risk.

Thus. the law of Oregon should not apply.

DOES THE DOCTRINE OF ADHESION APPLY HEREIN

The protection regarding choice of the law of a foreign jurisdiction given to the local resident is based upon the doctrine of adhesion, in that the insurer can force the insured to accept its terms including that litigation be brought in a distant and inconvenient forum imposing travel and expenses upon the insured who has no choice nor leverage.

It is accepted fact that Aqua-Marine wrote the charter party agreement and imposed the conditions on both Defendant Michael Banks and that Polaris Insurance Company, Ltd. who agreed to accept those terms and conditions and that the Polaris Instrument is not a contract of adhesion.

The court's construction and interpretation of the statute violates accepted general Maritime law. The state of Oregon can exclude simple surety agreements where the only duty of the "surety is to pay money" as being not maritime in nature but it cannot exclude a contract that is truly Maritime or marine in nature and that has been adjudicated as such by the 9th Circuit, itself, under the very same facts and in the very same decision.

WHEN DOES ADMIRALTY LAW CONTROL AND PREEMPT STATE STATUTES

In its analysis of ORS 194 (1)(b) the 9th Circuit now claims that the Polaris Instrument was a surety bond and therefore not entitled to consideration as a marine contract (of insurance). Admittedly it is insurance whether surety or otherwise. We look to the approach taken by Aqua-Marine, and the District Court. They were all familiar with the laws of the State of Oregon. Practicing Maritime insurance litigation,

working with insurance policies, and sitting in Admiralty. What they said was: "a surety agreement is a surety agreement" until the 9th Circuit's Opinion that what may otherwise be a surety agreement is a maritime agreement and if the agreement is insurance as admittedly this is, it is maritime or marine insurance as a matter of judicially established federal admiralty or general maritime law.

See Suma Fruit, infra. where the relevant term is judicially established in federal Admiralty law, that definition must be accepted as law despite any (state) attempt to define it locally. It would have been senseless for the appellate court to perform the exercise of determination and meaningless that courts rely on the analysis of Benedict On Admiralty. Note that in Bank of San Pedro, 53 F.3d at 275, the State of California was not concerned with the nature of the contract in order to come to the issue of whether a bond should be posted. A policy of wet marine insurance was entitled to the exemption from posting bond provided it had been purchased through a licensed excess an surplus lines broker, and provide further that the contract had been reported to the commissioner of insurance. These conditions precedent to the application of the wet marine exemption had not been met. Those conditions did not concern any judicially established federal maritime rule.

In consideration of the 9th Circuit's ruling regarding the maritime nature of the contract, and cognizance in Admiralty the contract here at issue, is not the same kind of contract described as "surety bond" in ORS 731.174(1)(b) because the District Court's definition refers to the duty only to pay money whereas Polaris' duty was to perform a maritime contract.

Since the term "Performance Bond" used n the Polaris contract herein is not of the type of Performance Bond intended for consideration by ORS 731.174(1)(b) Polaris policy is not excluded from being classified a as marine insurance.

The 9th Circuit's recognition of the subset of laws and their interrelationship operates to afford Polaris the benefit of ORS 731.174(1)(b) does not apply herein and the entire discussion regarding the application of state law accordance with Wilburn Boat does should be disregarded.

Polaris contended that it qualified under the statute as insuring interests in a vessel, that the right of return of the vessel was 9th Circuit listed the twenty five

DID THE 9TH CICUIT PROPERLY APPLY THE DOCTRINE OF EJUSDEM GENERIS

The 9th Circuit is in error as a matter of law in its application of doctrine of ejusdem generis construction of ORS 731.174(1)(a). Ejsudem generis should be used only when a statute is unclear or ambiguous. The (1)(a) part of this statute is clear and unambiguous in regard to the items listed. Thus the clear meaning of the language used should be the rule of construction.

Among the twenty five specific items listed in the statute and repeated in the 9th Circuit opinion is/are Vessels, crafts, profits, moneys and choses in action.

The duty is expressed in the 9th Circuit Opinion that Plaintiff demanded return of the Aqua 242. Aqua-Marine did not demand damages. Aqua demanded rescue and return of the Aqua 242 which was a chose in action, an interest in the barge to wit the right of the owner to possess the barge well within the grasp of ORS 731.174(1)(a).

The court instructed that:

> "Unless the bond constitutes a contract of "marine and transportation insurance" under ORS 174, it cannot be deemed a "wet marine"

insurance contract under ORS 194." and then investigated the effect of ORS 174

> Subsection 1(a) of the general "marine and transportation insurance statute enumerates no fewer than twenty specific categories of things insurance against loss of or damage to which is marine insurance. These are generally insurance against loss of or damage to which is marine insurance. These are, generally, modes of conveyance, (boats, cars, planes) goods and cargo, media of exchange, (cash, bullion), gems, financial documents, ("evidences of debt," securities) choses in action, and maritime hypothecations (respondentia and bottomry interests). The general term "and all other kinds of property and interests therein."

When terms are established or defined in the course of federal maritime litigation they become final as to their meaning. There is no further argument.

Clearly, the insured risk is listed in those twenty five categories and defendant need not resort to the general phrase or interests therein because the insured risk is a chose in action. A chose in action as defined in Black's Legal Dictionary is a personal right not reduced into possession, but recoverable by a suit at law. North Carolina Bank & Trust Co. v. Williams, 160, SE 484 , 485, 201 N.C. 464. The phrase includes not only all personnel chattels which are not in possession, but a right of action for their possession. In subsection 1(a) the term chose in action applies both to the right to bring an action and the thing itself, which is the subject matter of the right. In this case, Aqua's right is to have the barge in its possession or the barge itself. Thus Polaris' contract therefore qualifies under both the enumeration of the term "chose in action" and the

term "vessel". Subsection 1(a) also includes "profits" which in this case amounts to the unpaid rent. Thus Polaris is included within the meaning of 1(a) on a factual basis regarding risks covered.
See Wisby v. Nationwide Mut. Ins. Co., 507 P2d. 17, (Or. 1973).
Polaris stresses that Wisby is an Oregon Appellate Court decison. Ownership of an automobile implies the right of possession and control. The term chose in action includes a personal chattel not in actual possession.

DOES ORS 731.194 APPLY TO DEFEAT POLARIS RIGHT TO THE WET MARINE EXEMTPTION

What a contract is styled or labeled by the parties does not determine its character or their legal relationship nor is the name given to a contract determinative in its construction. Although the name given by the parties must be considered in order to ascertain the meaning and nature of a contract, the greater weight must be given to the operative contractional clause of the agreement. In determination of the real character of a contract, courts will look to its purpose rather than the name. See Heryford v. Davis, S.Ct. Oct.1880, 235 at 243-244.

The 9th Circuit itself has ruled that the instrument is not a surety bond but rather a maritime contract in the context of its effect and not merely the title addressed to it.

The 9th Circuit's logic flows to the subset of laws to a conclusion that the contract is not by virtue of (1)(a) through application of ejusdem generis and is excluded from being a treated as a marine contract by (1)(b) because it is a surety bond, it is not entitled to the exception under ORS 174. The Wet or Ocean Marine Exemption.

Application of the federal judicially established rules whereby the 9th Circuit itself overruled the District Court below and found that the Surety Bond was a maritime contract, Marine and Maritime are synonymous, neither the state of Oregon nor the federal courts can apply the exclusion in (1)(b) to say that it is not a marine contract. Thus it does qualify for the protection intended by the Wet Marine Exclusion of ORS 746.360(1) as a Wet Marine Insurance Policy under ORS 731.194

These conclusions do no violence to the tradition of fairness and equity and should be applied as being not only legally correct but morally correct and as good economic policy. The final result is that Plaintiff gets its day in court. Polaris gets its day in court, Cross-Defendant Aqua-Marine and Third Party Defendants, Banks and Latham Smith will not escape the consequences of their cabal.

The reasonable, fairly considered, freely negotiated expectations of the parties should be respected and supported and the commercial and economic realities of the 20th Century should be promoted.

The District Court had failed to recognize Benedict on Admiralty's full text regarding surety agreements. See Ch 3-10 at 101 Re: Insurance Contracts. Benedict cited Insurance Co. v. Dunham, 78 U.S. (11 Wall) 1, 20 L Ed 90 (1891) And at Ch 3-10 at 102 stated:

> "A surety agreement is held not to be an admiralty contract, since the obligation of the surety is only to pay damages in the event of liability on the underlying contract; yet a guarantee to fully perform a maritime contract does give rise to an admiralty claim. Citing Japan Line, Ltd. v. Willco Oil Ltd., 424 F.Supp. 1092 (D) Conn." (Emphasis added.)

Japan Line, Ltd. v. Willco Oil Ltd., 424 F.Supp. 1092 (D) Conn." (Emphasis added.)

This decision based on the facts and law applied by the District Court is clearly in error and reversible by any standard. The Polaris performance "bond" is not a traditional indemnity contract because it establishes Polaris' responsibility to perform two duties that are strictly and traditionally maritime in character. 1.) To pay the rent which the Charterer, Banks, had not paid and 2.) To return the barge to Everett, Washington, by sea. Both of these duties were to be performed in accordance with the Bare Boat Charter incorporated within the bond. Said Charter detailed the place of return, the manner of execution, inspection and acceptance by the owner's agents. See Charter and Bond. Authorization to perform is implied with the duty to perform that was owed by Banks according to the Bare Boat Charter. Thus, according to Benedict upon which authority the District Court relied, the bond is a Maritime Contract.

In Jack Neilson, Inc., v. Tug Peggy et al., Tug Margaret et al., Tug Carmen et al., 428 F.2d 54 (1970) n 1, on petition for rehearing the appeals court ruled "Action by owner of vessels seeking recovery of unpaid monthly rentals under lease-purchase agreement cast in the form of a bare boat charter was within admiralty jurisdiction of district court." and established that the payment of rent is a maritime obligation."

In Compagnie Francias de Navigation a Vapeur v. Bonnasse, 19 F.2d 777, 779 (2nd Cir. 1927) n.2. the appellate court ruled that, "The obligation of one bank on a general average bond issued by another bank which had been assumed by the collecting bank, (is) held to be a maritime obligation, as affecting the jurisdiction of the maritime court. Compagnie distinguished the ruling in Pacific Surety Co. v Leatham, 151 F. 440 (C.C.A. 7) as a case in which the respondent had made himself surety for a charterer and jurisdiction was refused in such cases on the ground that the surety had not agreed to

perform the principal's obligation, but merely to pay a sum of money in case of his default (damages). In Polaris as in Compagnie the appellant had agreed to assume the obligation of the principal. In Polaris the principal is the Charterer. In Compagnie the principal was the original bank.

Eagle Transport Ltd. Inc. v. John O'Connor & Sons, Inc., 449 F.Supp. 58 (1978) n 4 and 5 distinguishes between a surety's undertaking merely to pay money damages in the event of the principle's default and an undertaking to specifically perform the principal's maritime obligations in the event of the principals non-performance. The later type alleged in the complaint has consistently been held to be a maritime contract. See also Japan Line v. Wilco Oil Ltd., (Supra), Black Sea Steamship Line v. Association of International Trade Dist., F.Supp. 189, 183 (S.D.N. Y. 1951) Northern Star S.S. Co. v. Kansas Milling Co., 75 F.Supp. 534, 535, 536 (S.D.N. Y. 1947) Under the rule where a principal's obligation is maritime in nature, a promise to assume the obligation is itself a maritime contract.

IS THE POLARIS CONTRACT MARITIME AND MARINE FOR THE PURPOSE OF ORS 731.194

This classification makes a determination that the contract is Maritime or Marine. This is a determination which conclusively establishes the nature of the agreement as a matter of admiralty and general maritime law.

In the recent case of Suma Fruit International, v. Albany Insurance Co., No. 96-15774 (9th Cir. decided filed July 31, 1997, issues similar to those referred to in Wilburn Boat v. Fireman's Fund were decided. The case Summary bears the caption Insurance/Admiralty and Marine which is the subject of this writ. In Suma the District Court applied a judicially established rule in admiralty to the case. The Albany Insurance Policy excluded damage to perishable goods except for "damage caused by derangement or breakdown of the

for "damage caused by derangement or breakdown of the refrigeration equipment, ..." The court had considered the interpretation of the terms derangement of breakdown of refrigeration equipment, before, in Larson v. Insurance Co. of N. Am., 362 F.2d 261 (9th Cir. 1966).

Federal Admiralty Law governs disputes arising from maritime insurance contracts when an established federal rule exists. The facts showed that in Suma, just as in Larson, the cause of damage was failure to correctly set the fresh air vents of the ship's refrigeration system. The district court in Larson had held that the term "derangement or breakdown of refrigeration equipment" applies to a functional or mechanical disorder of the equipment not to human failure to operate it properly. The court then ruled that Larson constitutes a judicially fashioned admiralty rule that uniformly provides that the term derangement or breakdown of refrigerating machinery as used in maritime insurance applies to losses caused by mechanical disorders of refrigeration equipment. Suma's losses were not covered by the perishable cargo clause of the policy.

In Polaris, as in Suma and, Larson, the judicially established federal rule exists. Once it is so established the courts must treat it in all respects as a the law of the case. Thus the Polaris Policy is entitled to the exemption afforded to other maritime policies.

The application of Wilburn Boat, Larson and Suma herein make it clear that the statute is preempted with regard to the application of Oregon law concerning the exclusionary term Surety Bonds. Those contracts that may be surety bonds within as described in ORS 731.194 the statutory definition of Surety Bonds is preempted as to this unique and particular instrument because this particular instrument is a maritime contract as a matter of law and the statute as written taken together with the affidavit of Ms. Bjork and ORS 731.138 the

type of contract which was not intended to be classified as merely a "surety contract".

Plaintiff's reliance based on Bank of San Pedro is misplaced in that the operative statutory elements that disqualified the petitioner from the maritime exemption in San Pedro were: 1. that the contract was not provided by a licensed Excess and Surplus Lines Broker and 2. that the contract was not reported to the commissioner of insurance.

We have shown that there is accepted Federal Maritime Case Law that determines that the Performance Bond is a Maritime Contract and warrants Admiralty Jurisdiction. Thus when the court under the doctrine of Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S: 310, 75 S.Ct. 368 (1955) applies local law, the Insurance Code of the State of Oregon, it runs afoul of the Wet Marine Exception. Exemption under ORS 746.360(1)

ORS 746.360(1) exempts "wet marine and transportation insurance" from the requirements of ORS 746.340. Wet marine insurance is defined by ORS 731.194(1) as "[i]nsurance upon vessels, crafts, hulls and of interests therein or with relation thereto and of interests therein or with relation thereto."

SHOULD THE PARTIES CHOICE OF LAW BE UPHELD

This is a case of first impression in that it is the party who drew the contract that made the choice of law and imposed it upon the others who now seeks to disavow it. This is a blatant example of forum shopping. And the others seek to apply a two three or four step analysis to factors outside the intention of the parties totally ignoring the rights of all parties to determine their commercial relationship.

If this case is in Admiralty it is bound to the rules of Admiralty law no matter what jurisdiction is pleaded by the plaintiff. Admiralty Law is a creature of the United States Constitution while jurisdiction by diversity is a creature of statute. It is only when there is no generally accepted maritime law federal statute or federal judicially established rule that state law may control the contract.

> "ARTICLE 17. APPLICABLE LAW:
> This charter shall be interpreted in accordance with the laws of the United States of America, Where State law is applicable to or may apply to this charter, the [law] of the State of Washington shall govern."

The language in ARTICLE 17. obviously giving deference to the laws of the United States of America and recognizing that State Law may be applicable shows a degree of sophistication that the framer of the choice of laws clause did so with sufficient knowledge, expertise, and familiarity with the laws of the United States of America and the laws of the State of Washington appertaining to the business at hand that satisfy the requirements to justify enforcement thereof.

The parties have made a choice of law in the contract written by the Plaintiff, Aqua-Marine, which had full cognizance of its needs and the location of the property interest insured.

Plaintiff, Aqua-Marine has brought suit against Polaris in an improper jurisdiction to take advantage of the local court where it is domiciled. By their terms, the contract and the bond are to be governed by the Law of the State of Washington.

SHOULD PARTIES' LAW AND FORUM SELECTION BE UPHELD EVEN WHERE NEITHER PARTY IS A RESIDENT OF THE SELECTED FORUM

In M/S Bremen and Unterweser Rederei GmBh, Petitioners v. Zapata Off-shore Company, 406_407 U.S. 1 (1975) [In Admiralty, see note 2.] The subject was towing of a drilling rig owned by Zapata from Louisiana to the Coast of Italy. Zapata was an American corporation, M/S Bremen was a German corporation. The State of Washington is a maritime state doing more maritime business than Oregon. The court approved a forum selection clause freely selected by the parties where the forum's only nexus was that the selected forum was experienced in resolving the type of dispute that would probably arise and that it had no interest therein and would therefor more likely be impartial than a forum related in any way to either of the parties. This case establishes the truly modern approach. Zapata is conclusive on all other courts of the United States. The facts in Aqua-Marine are very similar to those of M/S Bremen in that Aqua-Marine and Zapata are both American Corporations. Polaris and Unterweser are foreign corporations. Everyone was sophisticated in the business at issue, the tow in Zapata was from one point on the Globe thousands of miles to another point on the Globe the tow was through international waters an the parties with the particular litigation in mind chose the forum in which to try it. The forum was competent and experienced.

> N. 1 "Where [an] American company with special expertise contracted with [a] foreign company pursuant to arms' length negotiations by experienced and sophisticated businessmen for towing of [a] complex machine thousands of miles across seas and oceans. and [a] forum selection clause provided for treating any dispute before London Court of Justice was part of contract [the] clause was prima facie valid."

N. 3 Contracts: "Freely negotiated private international agreement[s] unaffected by fraud, undue influence of overweening bargaining power should be given effect."

At page 1912

"The expansion of American business and industry will hardly be encouraged if not withstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved in our courts. Forum selection clauses have historically not been favored by American courts on ground ... contrary to public policy ... This view, [that such clauses are prima facie valid and should be enforced unless enforcement in "unreasonable" under the circumstances... is the correct doctrine to be followed by federal district courts sitting in admiralty." [Emphasis added]

Only one concession is made by the Supreme Court in Zapata's favor and that is a remand to the District Court below to consider whether forum non-conveniens should relieve Zapata from enforcement of the forum-selection clause. There being no further report in this case we conclude that the case stands as briefed herein. It is unlikely that this court need make the same concession to order further proceedings in the District Court below regarding forum non-conveniens since Plaintiff is presently doing business in Everett, Washington, the distance from Everett, Washington is a few hundred miles serviced by Alaska Airlines through Seattle, Washington. On August 1997 Alaska Airlines offered to sell Polaris' counsel a round trip ticket; Portland, Oregon / Seattle, Washington, 37 miles from Everett, Washington for $129.00 provided it was ordered 14 days prior to departure.

Despite M/S Bremen v. Zapatea Off shore Company 92 S.Ct. 1907 (1972). there is a still a split of authority regarding the parties right to choose the law that will govern their contract, their right to choose the forum and the enforceability of that choice. The opinion herein and all those relied upon by the 9th Circuit and the Restatement. These opinions vary according to the nature of the parties, the relationship between or among them and the purpose of their choice. There is no case law in which a party is seeking relief from the terms he himself demanded. [Emphasis added]

Full briefing on appeal will resolve the matter of the effect of the plaintiff's free and conscious choice of law, the meaning of surety bond in the context of the definition in subsection (b) and the plain meaning of the statute which lists choses in action and the court's use of the doctrine ejusdem generis in construing a statute.

The truly modern view is codified in the State of California in CC 1646.5 which gives the parties full authority to agree that California law will govern their rights and duties, in whole or in part regardless of whether the contract bears a reasonable relation to the state of California wherein the subject matter of the contract exceeds two hundred fifty thousand dollars, ($250,000.00). The Restatement is behind the times in it holding that the modern view requires a "substantial relationship" with the state of the law or forum chosen. The modern view allows that parties full range of negotiation and choice provided the parties have not made. their choice to avoid the laws of a state. California is within the 9th Circuit and its laws have become at issue herein vis a vis Bank of San Pedro supra.

Protecting the local party is proper only when that party is in an unequal bargaining position and when the objectionable terms are mandated by the other party. It makes

no sense when the objectionable terms are mandated by the protected party. It is an example of jurisprudential doctrine of "heads I win, tails you lose". If at the time for litigation the terms of the chosen law are favorable, sue in the chosen forum and impose laws of the chosen jurisdiction, if not, sue in the forum of your residence and impose its laws as done here.

Again from Zapata N. 8 "Where a forum selection clause of contract was clearly [a] reasonable effort to bring vital certainty to [an] international transaction and to provide [a] neutral forum experienced and capable in resolution of admiralty litigation, [the] party seeking to litigate in another forum on grounds of "inconvenience" had [the] burden of showing that trial in [the] contractual forum would be so gravely difficult and inconvenient that he would for all practical purposes be deprived of his day in court."

There is only one reason for the substantial relationship test and that is to guard against purposeful evasion of a state's laws. The facts herein show that it was plaintiff who demanded the clause. There is no way that this test should be levied against Polaris because Polaris did not conceive the choice. Banks did not demand the choice. Aqua-Marine did and now chooses to disavow it. Aqua is in delicto and asks the court relieve it for its delict all to its benefit at the expense of Polaris. Seeman v. Phila., S.Ct 626 and Mencor Enterprises v. Hets Equities Corp,. 190 Cal. App. 3d at p. 437; 235 Cal. Rptr. 464.

The parties in Polaris do have a substantial relationship to Washington in that Aqua-Marine was doing business there, kept substantial personal property there, including the Aqua 242, the subject of the charter and insurance. Everett was the beginning and the terminus of the charter party agreement. Washington was at the time of making the agreements herein the most reasonable and logical place for survey of the barge

by the same surveyor employed by plaintiff before turning the barge over to Bamks, for making a determination of the final costs of refitting the barge and for suit on breach of the agreement. It is clear that Aqua-Marine had all this in mind when it wrote the Charter Party Agreement which was in part a form contract made by Aqua-Marine The provision for choice of law appears as a blank space for insertion of the choice and was filled in by Aqua-Marine for this particular charter.

The California Court in Nelloyd Lines BV v. Superior Court, 3 Cal. 4th 459; 11 Cal. Rptr. 2d 330 "There is no public policy reason to deny enforcement of a forum selection clause appearing in a contract that is entered into freely and voluntarily by parties who have negotiated at arm's length. The Hong Kong connection was nominal at best because the lender was incorporated there. The principal place of business was in the State of California. The contract was entered into and to be performed in the state of California, yet the California Supreme Court of the State of California reversed the decision of the 4th District Court of Appeal and found that Hong Kong has the greater interest. What the court really said was, "Hong Kong has Billions of dollars and we don't want our residents and citizens declared personna-non-grata in the world of Hong Kong finance. The State of California is the leading exporting state in the United States and we aren't going allow parochial decisions to interfere with California's prosperity.

See the footnote 11 in Nelloyd at page 487

> "11 California leads the United States in exporting, accounting for one out of every seven export dollars, " In 1991, California exported over $63 billion (dollars) in goods ... California ports handled two-way trade valued at nearly $175 billion (dollars) (CAL State World Trade Com, 1991 Cal. Trade Highlights p. 1.) Between 1987 and 1990 Exports increased by an average of 20 per cent per year. Exports represent 60

> percent of the state's real economic growth in 1991. Foreign investment in California exceeded $60 billion (dollars) in 1989 the last year that figures were available and total employment in California attributable to foreign investment was 496,400 (people employed) in 1989."

[No mention is made in the footnote of the "ripple effect" in export trade. Every new dollar that comes in goes around at least four times. (Added by writer.)]

Nelloyd stressed the need for predictability and protection of the justified expectations of the parties. The Supreme Court of the United States has endorsed this position in a closely related context, stating that a choice of forum provision is "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." See Scherk v. Alverto-Culver, 417 U.S. 506; 94 S.Ct. 1449, cited in Nelloyd at page "We cannot have trade in and commerce in world markets on our own terms." [Emphasis added]... "Due respect by California Courts for contractual choice-of-law provisions will assist California's resident businesses and industries to expand and prosper." The voyage in Polaris took Aqua 242 along the coast of Oregon, California, Mexico, Honduras, Panama through the Panama Canal, along the Gulf Coast along the coast of Mexico, Texas, Louisiana and to Alabama etc. The barge carried a missile nose cone and parts of a submarine.

The Supreme Court has agreed with the parties choice of law even at the expense of protective federal statutes. One would consider a statute that was enacted specifically to prevent the arbitration regarding bills of lading in foreign courts was a strong local interest. See Vimar Seguros Y Reaseguros, S.A., Petitioner v M/V Sky Reefer, 115 S.Ct. Rptr. 2322 (1995). Court permitted the foreign party's

enforcement of the FAA Arbitration Clause called for in the Bill of Lading despite violation of the Carriage of Goods by Sea Act, COGSA. Both laws are valid and there is no lessening of liability.

CONCLUSION

The 9th Circuit agrees that the Polaris Insurance Policy is a maritime contract congnizable in admiralty and that jurisdiction in this case is properly in admiralty rather than diversity.

Applying the same authorities. the Restatement, the insurance laws of Oregon, Ejusdem Generis, disposed of that matter in its ruling vis a vis the analysis of the contract as being maritime or marine, that Washington law the Washington have been lawfully chosen by the parties and there selection should be enforced.

For all the reasons herein, review should be granted to resolve the split of authority to establish a national policy. The admonition of Justice Souter in the 9th Circuit opinion that "this is one of those close cases," should be respected and this court should grant this Polaris petition for writ of certiorari so that a full briefing on appeal may resolve the many confusing issues herein in keeping with the necessity that judicially established federal rules in admiralty be respected in the several maritime states.

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

APPENDIX A- OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON
FILED March 28, 1997

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Civil Action No. 90-3076 HJF

POLARIS INSURANCE COMPANY, LTD.
Petitioner.

AQUA-MARINE CONSTRUCTORS, INC.
Respondent,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
HELEN J. FRYE , JUDGE, PRESIDING

ARGUED AND SUBMITTED JANUARY 6, 1997

FILED MARCH 28, 1997

Before Harry Pregerson and Sidney R. Thomas Circuit Judges
and Edward C. Reed Jr.* District Court Judge

Opinion by Judge Reed

SUMMARY

ADMIRALTY and MARINE/INSURANCE

The court of appeals affirmed a judgment of the district court. The court held that federal maritime law does not pre-

empt a state statute requiring a vessel charterer's unauthorized foreign surety to post a litigation bond.

To ensure Michael Banks's performance under a bareboat charter agreement, appellee Aqua-Marine Constructors, Inc., an Oregon resident, required Banks to obtain a performance bond securing payment of the hire and redelivery of Aqua-Marine's *Aqua 242* at Everett, Washington. Banks, a California resident, obtained a performance bond from appellant Polaris Insurance Company, a foreign (Costa Rican) carrier. The charter party specified Washington law as governing disputes over the agreement.

Banks defaulted on the charter payments. *Aqua 242* was arrested at the instance of a towage operator who had recorded a lien against it. Aqua-Marine demanded that Polaris rescue the barge, make redelivery at Everett, and pay Banks's charter arrearages. Polaris refused, citing Banks's nonpayment of premiums and failure to tender the collateral required by the terms of the bond.

Aqua-Marine sued Banks and Polaris in Oregon federal court, alleging diversity jurisdiction. Polaris answered and cross-complained, invoking admiralty jurisdiction. Banks did not appear, and the district court entered a default judgment against him.

Under an Oregon statute, an insurance carrier like Polaris that is not certified to do business within the state must, before filing any defensive pleading, post a litigation bond to ensure payment of any judgment that might be rendered against it. Washington has no like statute.

Citing the Oregon litigation-bond statute, the district court struck Polaris's answer and cross-complaint and ordered it to deposit $150,000 into court. Polaris refused to make the deposit and was cited for contempt. The district court granted

Aqua-Marine's motion for summary judgment and entered judgment against Polaris and Banks.

On appeal, Polaris contended that because the performance bond was a maritime contract, any dispute arising under it had to be resolved solely under federal maritime law. Polaris's core position was that to the extent that Oregon's insurance statutes purport to apply to maritime insurance contracts, they are preempted by federal maritime law.

Polaris also cited the choice-of-law provision in the charter party, asserting that Washington law applied to disputes over the performance bond. Alternatively, Polaris urged that because neither the execution of the bond nor the *Aqua 242*'s voyage took place in Oregon, state law did not apply to Aqua-Marine's action on the bond.

[1] The question whether the performance bond was a maritime contract was irrelevant for the purpose of determining whether the Oregon statute was preempted by federal maritime law. [2] Federal maritime jurisdiction is not exclusive. State and federal authorities jointly wield control over maritime matters. A state court exercising in personam jurisdiction over a maritime claim may adopt remedies as it sees fit, so long as it does not attempt to make changes in the substantive maritime law.

[3] Oregon's statute imposes a significant burden on a defendant unauthorized insurer. [4] How a rule is characterized for purposes of determining whether federal maritime law preempts state law will turn on whether the state rule unduly interferes with the federal interest in maintaining the free flow of maritime commerce.

[5] The Oregon statute neither contravenes any Act of Congress nor prejudices any characteristic feature of, or interferes with, the uniform application of federal maritime law. [6] To the extent that the Oregon statute works a prejudgment

"seizure" of the property of an unauthorized foreign insurer, it is incorporated by reference in the federal rules of procedure for maritime claims. The Oregon bond-requirement statute does not conflict with federal maritime rules.

[7] The question remained whether Oregon law *should* apply to the action. [8] To settle any choice-of-law issue, it was necessary to determine whether federal jurisdiction derived from diversity of citizenship or from the maritime nature of the contract sued upon. A federal court sitting in diversity applies the choice-of-law rules of the forum state, while a federal court sitting in admiralty must apply federal maritime choice-of-law rules.

[9] As a general rule, admiralty law applies to all maritime contracts. It is the subject matter of a contract that determines the existence of federal maritime jurisdiction over a contractual claim. If the subject of the contract relates to the ship and its uses as such, or to commerce or navigation on navigable waters, or to transportation by sea, the contract is maritime. If the contract sued on is directly and in essence a maritime obligation for the performance of maritime services or transactions, a suit on the obligation is cognizable in admiralty.

[10] The charter executed by Aqua-Marine and Banks required Banks to obtain a bond. Polaris was not a party to the charter, and the charter was not the subject of the appeal. [11] Normally, a performance bond that compensates an obligee for loss in the event of nonperformance by the obligor is not a maritime contract. But the performance bond at issue obligated Polaris to *perform Banks's obligations under the charter* in the event of his default. Such a contract is maritime, for it requires the obligor to perform a duty uniquely maritime in character.

[12] A charter party is a maritime contract. The bond therefore contemplated Polaris's assumption of Banks's duties under a maritime contract. [13] Aqua-Marine's action against

Polaris was therefore cognizable in admiralty. [14] As admiralty jurisdiction was properly invoked by Polaris, the choice of law was governed by federal rules.

[15] Federal maritime law will not preempt state insurance statutes requiring a defendant insurer to post a bond before filing any pleadings in the action against it. Oregon enacted such a statute: Washington did not. [16] Applicable law is determined by identifying the state that has the most significant relationship to the transaction and the parties.

[17] California, Oregon, Washington, and Costa Rica all had significant contacts with the performance bond. [18] Oregon had a greater interest in the application of its insurance code than did California or Washington. Although Costa Rica might have had a substantial interest in applying its laws, Polaris never argued that Costa Rica law should apply. [19] Oregon was therefore the state with the greatest interest in the resolution of the action. [20] The district court's determination that Oregon's insurance statutes applied was therefore correct.

[21] Oregon's insurance code applies to all persons who transact insurance within the state or relative to a domestic risk. Polaris made an insurance contract, thereby "transacting insurance." [22] The risk was that Banks would fail to redeliver the barge at Everett, Washington. In no sense was the risk a "domestic risk." The *Aqua 242* resided in Washington and was at no relevant time located in Oregon. The subject of the insurance did not reside, was not located, and was not to be performed in Oregon. Unless Polaris transacted insurance *in Oregon*, Oregon's insurance code did not apply to the performance bond.

[23] The performance bond was executed for the benefit of an Oregon resident. The fact that the barge was home-ported in Washington was not dispositive. Nor was the fact that Polaris did not issue or deliver any policy in Oregon. By

underwriting a marine risk in favor of an Oregon resident. Polaris transacted insurance business "in Oregon."

[24] Oregon's requirement that a defendant insurer either procure a certificate of authority or deposit cash or a bond to secure payment of a judgment against the insurer [25] does not apply in an action arising out of a policy of wet marine and transportation insurance. [26] Under Oregon law, "wet marine and transportation insurance" is a subset of general marine transportation insurance. [27] Unless the bond constituted a contract of marine and transportation insurance, it could not be deemed a "wet marine" insurance contract.

[28] Because the surety bond was not marine transportation insurance under the Oregon statute, it could not be wet marine and transportation insurance. Aqua-Marine's action against Polaris was thus not one arising out of any policy of wet marine and transportation insurance. [29] The district court properly ordered Polaris to post the litigation bond.

COUNSEL

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G. Kevin Kiely, C. Kent Roberts, Schwabe, Williamson & Wyatt, Portland, Oregon, for plaintiff-appellee Aqua-Marine Constructors, Inc.

OPINION

REED, District Judge:

Introduction

Polaris Insurance Company appeals the order of the district court granting summary judgment in favor of Aqua-Marine Constructors, in Aqua-Marine's action against Polaris on a surety bond executed by Michael Banks and Polaris in favor of Aqua-Marine.

I. Facts

Aqua-Marine Constructors, an Oregon corporation, owns an oceangoing barge, the "Aqua 242." In May 1992 Aqua-Marine entered into a bareboat charter agreement with Michael Banks, a resident of California. Under the terms of the charter party, Banks was to take possession of the barge at Everett, Washington, make monthly charter hire payments in the amount of $24,000.00, and redeliver the barge to Aqua-Marine at Everett. The charter party obligated Banks to at least three months' hire, and further required him to obtain a bond securing the payment of the charter hire and the proper redelivery of the barge at the termination of the charter period.[1] Banks did obtain a performance bond which he and Polaris Insurance Company executed on May 15, 1992, in favor of Aqua-Marine.[2] Polaris is an insurance carrier incorporated under the laws of the Republic of Costa Rica.

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[1]Article 19 of the charter party provided:

> CHARTERER shall furnish to OWNER a payment bond in the amount of one hundred thousand ($100,000.00) dollars. This bond is to provide OWNER with insurance that all payment and redelivery requirements of this CHARTER are met. This bond does not release the CHARTERER from payment schedules as set forth elsewhere herein.

[2]The performance bond provided:

By the beginning of August 1992, Banks was in default of his obligation to make charter hire payments. At some point the barge apparently came into the possession of "Latham Smith," a towage operator, without Aqua-Marine's approval.[3] Smith recorded a lien against the barge, presumably for non-payment of services rendered the Aqua 242, and caused the vessel to be arrested by federal marshals in Charleston, South Carolina, on August 17, 1992.

The shipowner, Aqua-Marine, demanded that Banks' surety, Polaris Insurance, rescue the barge, make redelivery of the barge to Aqua-Marine, and pay Banks' charter hire arrears. Polaris refused, on the grounds (1) that its obligations

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> The condition of this performance bond is for the redelivery of the subject chartered barge Aqua 242 to the Owner, and this bond is to guarantee to the Owner that such redelivery requirements are met. Failing which, the Surety will perform on the redelivery, up to the specified amount of this guarantee bond.

Whether deliberately or inadvertently, the performance bond did not secure payment of the charter hire, as required by the charter party: The bond guaranteed *only* redelivery.

[3]The true identity of "Latham Smith" remains a mystery, indeed, there is some doubt even as to his name. Polaris' correspondence suggests that the barge "Aqua 242" was surrendered to one "Lanthram Smith." Correspondence from Aqua-Marine's attorneys identifies the lienor on the barge as "Smith Maritime," and the captions to the orders entered in the district court name "Latham Smith, d/b/a Smith Maritime" as a defendant in Polaris' cross-complaint. In his affidavit filed in opposition to Aqua-Marine's motion for an order requiring Polaris to post the litigation bond, Miguel Golcher, Polaris' Managing Director, described Latham Smith as a towage operator with "a propensity to impose liens on vessels he towed and to embroil them in litigation and seize them in far off foreign ports . . . ." Coincidentally, or perhaps not, there did exist, at least ninety years ago, a "Leatham & Smith Towing & Wrecking Co.," whose libel in admiralty is often cited as the source of the rule prohibiting the exercise of federal maritime jurisdiction over actions not wholly maritime in character. *See Pacific Surety Co. v. Leatham & Smith Towing & Wrecking Co.*, 151 F. 440 (7th Cir. 1907). Absent from the record in the present appeal is information sufficient to identify or describe him, or it, with any certainty.

under the performance bond had been suspended, and coverage canceled, in July 1992, after Michael Banks failed to tender his premium payments and (2) that Banks had never tendered the collateral required by the terms of the performance bond, thereby reducing Banks' coverage to zero.

II. Proceedings Below

In September 1992 Aqua-Marine sued both Banks and Polaris in an Oregon federal court, alleging diversity jurisdiction. On August 5, 1993 Polaris filed an answer and cross-complaint, alleging admiralty jurisdiction.

An Oregon insurance statute requires an insurance carrier not certified to do business in Oregon to deposit funds into court to abide a future judgment before filing any defensive pleadings in a civil action against it. On December 9, 1993, the district court, relying on this statute, struck Polaris' answer and cross-complaint, and ordered Polaris to deposit $150,000.00 in court. Polaris appealed the district court's ruling; that appeal was dismissed by this court for want of jurisdiction. Polaris refused to make the deposit, and on August 1, 1994 was cited for contempt. On September 7, 1995 the district court granted Aqua-Marine's motion for summary judgment, and entered judgment in favor of Aqua-Marine, and against Polaris and Banks. On October 3, 1995 Polaris instituted this appeal from the judgment of the district court.

III. Discussion

Polaris assigns as error the district court's choice of law and its construction of several Oregon insurance statutes. These assignments of error involve purely legal questions; our review of the district court's rulings is therefore *de novo*. *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1262 (9th Cir. 1996) (district court's statutory construction reviewed *de novo*); *Jenkins v. Whittaker Corp.*, 785 F.2d 720,

724 (9th Cir.) (district court's choice of law reviewed *de novo*), *cert. denied*, 479 U.S. 918 (1986).

A. Preemption

Polaris argues that the performance bond is a maritime contract, and that therefore any dispute arising out of the contract must be resolved purely by reference to federal maritime law; Polaris maintains, essentially, that to the extent Oregon's insurance statutes purport to apply to maritime insurance contracts, they are preempted by federal maritime law. Aqua-Marine, for its part, contends that the performance bond is not a maritime contract at all, or if it is, that the Oregon insurance statute nevertheless governs its action against Polaris.

[1] The question whether the performance bond is a maritime contract is irrelevant for the purpose of determining whether Oregon's bond requirement statute is preempted by federal maritime law: Under *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310 (1955), disputes over maritime insurance contracts may be governed by state law, in the same manner as non-maritime insurance contracts, as long as the state law does not clearly conflict with federal maritime law. *See Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 341 (1973). Polaris has not asserted, and we fail to discern, any direct conflict between the Oregon statute applied by the district court and federal maritime law, either statute or decisional.

[2] Federal maritime jurisdiction is not, and has never been, entirely exclusive. *American Dredging Co. v. Miller*, 510 U.S. 443, 446 (1994) (citing the "saving to suitors" clause of the federal Judiciary Act of 1789, § 9, 1 Stat. 76-77, *current version* at 28 U.S.C. § 1333(1)). State and federal authorities jointly wield control over maritime matters. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 374 (1959). It is, for example, beyond question that state courts may not

offer a litigant a remedy *in rem* for any cause of action cognizable in admiralty. *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124 (1924); *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 431 (1867). Nor may state workers compensation statutes be applied to personal injury actions over which the federal courts exercise admiralty jurisdiction. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). But a state court may, in exercising jurisdiction *in personam* over a maritime claim, " 'adopt such remedies, and . . . attach to them such incidents, as it sees fit so long as it does not attempt to make changes in the substantive maritime law.' " *American Dredging*, 510 U.S. at 447 (quoting *Madruga v. Superior Court*, 346 U.S. 556, 561 (1954)) (further internal quotation marks omitted). State-created maritime remedies offend federal admiralty prerogatives only where the state remedy "works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Jensen*, 244 U.S. at 216. The issue, then, is whether Oregon's requirement that an unauthorized insurer post bond before filing any pleading in an action against it does violence to any "characteristic feature" of admiralty or otherwise sounds a note so discordant as to destroy the proper harmony of federal maritime law. *American Dredging*, 510 U.S. at 447.

[3] Oregon's statute imposes a significant burden on a defendant unauthorized insurer. This burden is not uniform: some states may require such insurers to post security before appearing as a defendant in a civil action, and some states may not. But lack of uniformity may not by itself mandate federal preemption. The Supreme Court has noted that "it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied." *Jensen*, 244 U.S. at 216 (*quoted in American Dredging*, 510 U.S. at 451).

[4] The Court in *American Dredging* reversed the judgment of the lower court that Louisiana's *forum non conveniens* rule

made such inroads into the proper uniformity of federal maritime law as to be preempted. The Court was in large part persuaded that the Louisiana rule was "procedural" rather than "substantive," i.e. application of the state rule did not "bear upon the substantive right to recover, and [was] not a rule upon which maritime actors rely in making decisions about primary conduct — how to manage their business and what precautions to take." 510 U.S. at 454. At least in Justice Souter's mind.

> [t]he characterization of a state rule as substantive or procedural will be a sound surrogate for the conclusion that would follow from a more discursive preemption analysis. The distinction between substance and procedure will, however, sometimes be obscure. As to those close cases, how a given rule is characterized for purposes of determining whether federal maritime law preempts state law will turn on whether the state rule unduly interferes with the federal interest in maintaining the free flow of maritime commerce.

Id. at 457-58 (Souter, J., concurring).

The instant appeal is one of those close cases. The state rule prohibits a defendant unauthorized insurer from filing any pleading in an action against it before first depositing with the court funds sufficient to satisfy any judgment which might be entered. This rule is one upon which a maritime actor might rely in making decisions about primary conduct. It seems entirely possible that maritime insurers might seek to avoid like the plague those jurisdictions affording plaintiffs such a provisional remedy. Maritime insurers might refuse to execute insurance contracts in such states, or refuse to cover risks in those states. It seems even more likely that maritime insurers, having insured an Oregon resident, or having underwritten an Oregon risk, will order at least their secondary conduct with the Oregon provisional remedy in mind. That is, the knowl-

edge that Oregon will require the deposit by a defendant unauthorized insurer of enough money to cover the plaintiff's claims may well figure in litigants' decisions as to where to bring suit, or where to subject themselves to suit. *See id.* at 455. Because the subject state rule could conceivably influence both primary and secondary conduct, the dialectic of substance and procedure yields no ready answer to the question posed by the instant appeal. It remains, then, to be determined whether Oregon's rule "unduly interferes" with the federal interest in untrammeled maritime commercial activity. *See Wilburn Boat*, 348 U.S. at 321 (requiring federal admiralty courts to apply state insurance law where applicable to marine underwriters so long as such laws do not intrude upon federal admiralty principles); *Youell v. Exxon Corp.*, 48 F.3d 105, 110 (2d Cir.), *cert. granted and judgment vacated on other grounds*, 116 S. Ct. 43 (1995).

One panel of this court has addressed the very question presented by this appeal. In *Bank of San Pedro v. Forbes Westar, Inc.*, 53 F.3d 273 (9th Cir. 1995), a shipowner sued its hull insurance carrier, seeking recovery under the policy for the loss of the vessel. In the district court, the shipowner had moved to strike the carrier's answer for non-compliance with a California statute requiring unauthorized foreign insurers to post security sufficient to satisfy the judgment prior to filing any pleading in a civil action against it. Citing *Wilburn* and *American Dredging*, the appellate court ruled that because the statutory requirement was part of the state's regulation of insurance, and was "the kind of local policy that federal courts are to apply when sitting in admiralty," it was bound to apply the California bond requirement statute to the admiralty case at bar. *Bank of San Pedro*, 53 F.3d at 275; *see* Cal. Ins. Code § 1616.

The *Bank of San Pedro* panel did not find the California bond requirement to be procedural rather than substantive, nor did it find explicitly that the statute did not conflict with federal maritime law or policy. Instead, the *Bank of San Pedro*

court reasoned that "[t]o disregard [the statute] would be to damage the mechanism by which California regulates insurance." 53 F.3d at 275. This recognition, while correct, does not supplant the preemption analysis required by *American Dredging*.

[5] Other federal courts have grappled with the same question. In *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*, 605 F.2d 648 (2d Cir. 1979), the Second Circuit ruled that prejudgment remedies are not only procedural in nature, but also entirely consistent with traditional admiralty practice. *See Signal Capital Corp. v. Eastern Marine Management, Inc.*, 899 F. Supp. 1167, 1169 (S.D.N.Y. 1995) (approving imposition of New York bond requirement upon defendant foreign insurer, and citing *Compagnie Nationale Algerienne* as support for proposition that such prejudgment remedy is (a) procedural and (b) not in conflict with federal maritime law). In *Toomer v. Southwest Casualty Insurance Co.*, 231 F. Supp. 542 (S.D. Tex. 1964), which dealt with a Texas bond requirement statute more or less identical to the Oregon statute at issue in the present matter, the court ruled that the Texas statute neither contravened any Act of Congress, nor prejudiced any characteristic feature of, or interfered with the uniform application of, federal maritime law, and therefore could lawfully be applied in admiralty. *Toomer*, 231 F. Supp. at 543.[4]

[6] What is more, the federal Supplemental Rules for Certain Admiralty and Maritime Claims explicitly incorporate by reference state provisional remedies: In admiralty actions *in personam* "the plaintiff may . . . invoke the remedies provided

[4]In *Toomer*, the defendant insurer had argued, surprisingly, that the Texas bond requirement statute was procedural, not substantive, and that federal admiralty courts could, under *Wilburn Boat*, apply only substantive state rules. The court, on the other hand, was convinced "that the statute here should properly be characterized as substantive," but eschewed the procedure/substance dialectic in favor of the *Wilburn Boat* preemption analysis. *Toomer*, 231 F. Supp. at 543.

by state law for attachment and garnishment or similar seizure of the defendant's property." Fed. R. Civ. P. Supp. R. B(1); *see Result Shipping Co., Ltd. v. Ferruzzi Trading USA Inc.*, 56 F.3d 394, 401-02 n.4 (2d Cir. 1995). To the extent the Oregon bond requirement statute works a prejudgment "seizure" of the property of an unauthorized foreign insurer, then, the statute not only does not conflict with federal maritime rules, it is actually incorporated by reference in the federal rules of procedure for maritime claims.

B. Choice of Law

[7] The Oregon bond requirement statute is therefore not preempted by federal maritime law, but may lawfully be applied to an action before a federal court sitting in admiralty. The question remains, however, whether Oregon law *should* apply to this action at all. Defendant-Appellant Polaris argues that it should not. Polaris argues, first, that the clause in the charter party selecting Washington as the State whose law should apply to disputes over the charter party should apply with equal force to the instant dispute over the performance bond. Polaris argues alternatively that because neither the execution of the bond, nor the voyage contemplated by the charter party, took place in Oregon, that Oregon law should not apply to any action on the bond.

[8] In order to settle any choice of law issue, we must first determine whether this court's jurisdiction over the subject matter of this action, and that of the district court, derives from the diversity of citizenship of the parties, or from the maritime nature of the contract sued on. This is so because a federal court sitting in diversity applies the choice-of-law rules of the forum state, *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487, 496 (1941), whereas a federal court sitting in admiralty must apply federal maritime choice-of-law rules. *Sundance Cruises Corp. v. American Bureau of Shipping*, 7 F.3d 1077, 1080 (2d Cir. 1993) (citing *Kossick v. United Fruit Co.*, 365 U.S. 731, 735 (1961)), *cert. denied*, 114 S. Ct. 1399

(1994); *Mentor Ins. Co. (U.K.) Ltd. v. Brannkasse*, 996 F.2d 506, 513 (2d Cir. 1993) (citing rule of *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-11 (1953), that federal admiralty court must apply existing federal maritime law); *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882, 890 (5th Cir.), *cert. denied*, 502 U.S. 901 (1991); *State Trading Corp. of India, Ltd. v. Assuranceforeningen Skuld*, 921 F.2d 409, 414 (2d Cir. 1990); *Gonzalez v. Naviera Neptuno A.A.*, 832 F.2d 876, 880 n.3 (5th Cir. 1987); *Illinois Constructors Corp. v. Morency & Assocs., Inc.*, 802 F. Supp. 185, 187-88 (N.D. Ill. 1992).

The admiralty jurisdiction of the federal courts extends to all maritime causes of action. 28 U.S.C. § 1333(1). But is Aqua-Marine's cause of action on the performance bond a maritime claim?

[9] As a general rule, admiralty law applies to all maritime contracts. *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 29 (1871). Justice Story long ago announced the rule that a contract relating to the navigation, business or commerce of the sea is a maritime contract, an action on which may be brought in admiralty. *De Lovio v. Boit*, 7 F. Cas. 418, 444 (C.C.D. Mass. 1815) (No. 3,776). More recently, it has been held that a contract is maritime if it relates to a ship in its use as such, or to commerce or to navigation on navigable waters, or to transportation by sea, or to maritime employment. *J.A.R., Inc. v. M/V Lady Lucille*, 963 F.2d 96, 98 (5th Cir. 1992). It is, therefore, the subject matter (rather than the place of execution or place of performance) of a contract which determines the existence of federal maritime jurisdiction over a contractual claim. *North Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119 (1919); *The Eclipse*, 135 U.S. 599, 608 (1890); *The Steamboat Orleans v. Phoebus*, 36 U.S. (11 Pet.) 175, 183 (1837); *Genetics Int'l v. Cormorant Bulk Carriers, Inc.*, 877 F.2d 806, 808 (9th Cir. 1989). It is the character of the work to be performed under a contract which determines whether the contract is maritime. *Hinkins S.S. Agency, Inc. v. Freighters, Inc.*, 498 F.2d 411, 412 (9th Cir.

1974) (citing *Hall Bros.*, 249 U.S. at 125). If the subject of the contract relates to the ship and its uses as such, or to commerce or navigation on navigable waters, or to transportation by sea, the contract is maritime. *Ingersoll Milling Mach. Co. v. M/V Bodena*, 829 F.2d 293, 302 (2d Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988). If the obligation sued on is "directly and in essence" a maritime obligation, for the performance of maritime service or transactions, a suit on the obligation is cognizable in admiralty. *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758, 766 (3d Cir.) (quoting *Pacific Sur. Co. v. Leatham & Smith Towing & Wrecking Co.*, 151 F. 440, 443-44 (7th Cir. 1907)), *cert. denied*, 375 U.S. 940 (1963).

[10] The bareboat charter executed by Plaintiff-Appellee Aqua-Marine, the owner of the boat, and Michael Banks, the charterer, required Banks to obtain a bond securing payment of the charter hire and redelivery of the boat at the termination of the charter. Defendant-Appellant Polaris was not a party to the bareboat charter, and the charter party itself is not the subject of this appeal. Aqua-Marine sued Polaris for breach of the latter's obligations under the performance bond. Aqua-Marine has argued that the performance bond is simply not a maritime contract, but a garden-variety insurance policy, subject to state regulation in the same manner as any other contract of insurance.

[11] Normally, a performance bond which compensates an obligee for loss in the event of nonperformance by the principal obligor is not a maritime contract. *Leatham & Smith, id.*; *see also Butner v. Adams*, 236 F. 105, 107 (9th Cir. 1917). But the performance bond at issue in the present appeal obligated Polaris to *perform Banks' obligations under the charter* in the event of Banks' default. In particular, the performance bond required Polaris to assume Banks' obligation, under the charter party, to redeliver the barge to Aqua-Marine at the end of the charter period. Such a contract is quintessentially maritime, for it requires the obligor to perform a duty uniquely

maritime in character. The leading admiralty treatise has declared that

> a bond securing the performance of a charter party is not a maritime contract for the purposes of admiralty jurisdiction, although the charter party itself is a maritime contract; the surety on the bond neither promises performance of the charter party nor is [s]he authorized to do so; h[er] obligation is merely to pay damages in the event of non-performance. Where, however, there is a promise to perform a charter in the default of another, there is a maritime contract.

1 Steven F. Friedell, *Benedict on Admiralty* § 183, at 12-10 (1996) (footnote omitted). Aqua-Marine's claim against Polaris arises out of Polaris' promise, in the event of a default by the charterer, to return the ship to its home port.

[12] A charter party is clearly a maritime contract. In the event of a default by Banks, Polaris was to step into his shoes and perform Banks' duties under the charter party. The bond therefore contemplated Polaris' assumption of Banks' duties under a maritime contract. The bond was not, for example, a contract of insurance whereby Polaris promised to pay money in the event of a loss. In the event of a default, Polaris had undertaken "to assume the performance of the bond, to become the principal obligor, *to do the very act promised by* [the charterer], to substitute the promisor's performance for the promisee's." *Compagnie Francaise de Navigation a Vapeur v. Bonnasse*, 19 F.2d 777, 779 (2d Cir.) (emphasis supplied), *cert. denied*, 275 U.S. 551 (1927); *see also The Fort Armstrong*, 51 F.2d 1063, 1065 (S.D. Ga. 1931) (recognizing that while "the ultimate liability of the surety would be measured by money, it was in terms bound by all the obligations of its principal, and the obligation of the principal was to properly perform maritime duties in accordance with his profession"). *Accord Japan Line, Ltd. v. Willco Oil Ltd.*, 424

F. Supp. 1092, 1093 (D. Conn. 1976) (ruling that guarantee of performance of maritime contract was enforceable in admiralty); *Haller v. Fox*, 51 F. 298 (D. Wash. 1892) (exercising admiralty jurisdiction over action by shipowner against charterer's surety for unpaid charter hire and for unpaid services and supplies furnished to vessel).[5] *Cf. Leatham & Smith*, 151 F. at 443; *cf. also Interocean Shipping Co. v. National Shipping & Trad. Corp.*, 462 F.2d 673, 678 (2d Cir. 1972) (declaring that agreement to act as surety on a charter party is not a maritime contract), *cert. denied*, 423 U.S. 1054 (1976).

[13] Polaris' obligation to perform the charterer's redelivery obligation was therefore truly and completely maritime in character. *South Carolina State Ports Auth. v. Silver Anchor, S.A.*, 23 F.3d 842, 846 n.3 (noting that guarantor of principal's maritime obligation may be sued in admiralty) (4th Cir. 1994); *Rex Oil, Ltd. v. M/V Jacinth*, 873 F.2d 82, 86 (5th Cir. 1989) (concluding that settlement agreement provision requiring return of vessel to commerce imposed a maritime obligation), *cert. denied*, 493 U.S. 1043 (1990); *Davis v. Dittmar*, 6 F.2d 141, 142 (2d Cir. 1925) (upholding right of holder of third-party's guarantee of another's maritime obligation to sue guarantor in admiralty); *Japan Line*, 424 F. Supp. at 1093-94 (stating rule that guarantee of performance of another's maritime obligation is itself a maritime contract); *Northern Star*

[5] *Haller v. Fox* bears more than a passing resemblance to the present appeal. Haller, the shipowner, and Fox, the charterer, executed a bareboat charter of the steamboat "Mary F. Perley." The charter party required Fox to make monthly charter hire payments and to redeliver the vessel at the end of the charter term. Fox gave Haller a bond securing performance of his obligations under the charter party. Fox defaulted on the charter hire payments, incurred substantial expenses for services and supplies rendered to the vessel, and then absconded, leaving the ship in the hands of unnamed third parties. The shipowner sued the surety, and the court, citing *De Lovio v. Boit*, ruled that the action "is founded upon a contract relating directly to the employment, navigation, supplying, repairing, insurance, and possession of a ship," and that therefore the suit was properly brought in admiralty. 51 F. at 299.

S.S. Co. v. Kansas Milling Co. of Canada, 75 F. Supp. 534, 536 (S.D.N.Y. 1947) (ruling guarantee of performance of marine charter a maritime contract). *Cf. Eadie v. North Pac. S.S. Co.*, 217 F. 662 (N.D. Cal. 1914) (declining to exercise federal maritime jurisdiction over action on bond requiring charterer's surety to pay only damages in the event of default, rather than guaranteeing performance of any maritime obligation contained in the charter party). Aqua-Marine's action against Polaris is therefore cognizable in admiralty.

[14] In sum, actions against sureties on bonds securing performance are cognizable in admiralty if the surety's obligation under the bond is the same as that of the original promisor, but not if the surety is obligated only to pay a sum of money and the duties of the original promisor were otherwise. 7A James W. Moore, *Moore's Federal Practice* ¶ 260.2, at 3060 (2d ed. 1995). Polaris did undertake to assume Banks' obligations under the charter party in the event of a default by Banks. The performance bond is therefore a maritime contract.[6] As the court's admiralty jurisdiction has been affirmatively and properly invoked by Polaris, *see Bodden v. Osgood*, 879 F.2d 184, 186 (5th Cir. 1989), the choice of law to be applied is governed by federal maritime choice of law rules.

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[6]On the other hand, had Polaris promised, for example, (1) to pay a sum certain in the event of Banks' default on his charter hire payment obligations, and (2) to redeliver the barge should Banks fail to do so, the obligation to pay the sum certain would be non-maritime in character, *Leatham & Smith*, 151 F. at 443, and the bond would therefore be a "mixed" maritime and non-maritime contract. Ordinarily, a contract must be "wholly maritime" in nature to be cognizable in admiralty. *Simon v. Intercontinental Transp. (ICT) B.V.*, 882 F.2d 1435, 1442 (9th Cir. 1989). A claim on a "mixed" contract may be adjudicated in admiralty only if (1) the non-maritime obligations were "merely incidental" to the primarily maritime nature of the contract (in which case a federal admiralty court may hear both the maritime and non-maritime claims), or (2) the maritime claims could be severed from the non-maritime claims (in which case the federal admiralty court would hear only the severed maritime claims). *Id.* The wholly maritime character of the performance bond in the case *sub judice* obviates this "mixed" contract analysis.

[15] It is clear that federal maritime law will not preempt state insurance statutes requiring a defendant insurer to post bond before filing any pleadings in the action against it. Oregon has enacted such a statute: Washington has not. Polaris demands that the court apply Washington law.

This Circuit has never formally set out the choice of law rules to be applied where the law of more than one State vies for application in an action on a maritime contract. But the U.S. Court of Appeals for the Fifth Circuit, the federal courts' cutwater in matters maritime, recently confronted the problem. In *Albany Insurance Co. v. Anh Thi Kieu*, 927 F.2d 882 (5th Cir.), *cert. denied*, 502 U.S. 901 (1991), the Fifth Circuit, after first determining that federal maritime law would not preempt state insurance statutes, was forced to choose between the law of Texas and Louisiana in an action on a policy of marine insurance.

The Fifth Circuit began its interstate choice of law analysis by reciting the three commonly stated choice of law principles applicable to marine insurance contracts: First, there is the rule requiring a federal admiralty court to apply the law of the state where the contract was formed. Second, there is the principle whereby the court applies the law of the state where the contract was issued and delivered. Third, there is the question of which state possesses the greatest interest in the resolution of the legal issues presented. *Id.* at 890 (citing, respectively, *Graham v. Milky Way Barge, Inc.*, 811 F.2d 881, 885 (5th Cir. 1987); *Elevating Boats, Inc. v. Gulf Coast Marine, Inc.*, 766 F.2d 195, 198 (5th Cir. 1985); *Truehart v. Blandon*, 884 F.2d 223, 226 (5th Cir. 1989)).

As the *Albany* panel recognized, these separate rules might militate in favor of different results. The contract at issue in the present appeal was issued by Polaris in San Jose, Costa Rica, and delivered to Michael Banks in Long Beach, California. Banks executed the contract in California, and then forwarded it to Aqua-Marine in Portland, Oregon. The contract

was thus "formed" and "issued" in Costa Rica, and "delivered" in California, for the benefit of an Oregon resident corporation. And because Aqua-Marine, a third-party beneficiary of the contract between Banks and Polaris, is a resident of Oregon, that State clearly has a significant interest in the resolution of the dispute.

The *Albany* court noted that "modern choice of law analysis, whether maritime or not, generally requires the application of the law of the state with the 'most significant relationship' to the substantive issue in question." 927 F.2d at 891 (citing *Restatement (Second) of Conflict of Laws* § 6 cmt. c (1980)). The "most significant relationship" test requires identification of the place of negotiation and execution of the contract as a *means* of determining which states have had sufficient contacts with the parties and the transaction to justify application of their law. *Id.* (citing *Restatement (Second) of Conflict of Laws* § 188 (1971)). The Fifth Circuit concluded that the choice of law rules regarding the places of formation, issuance and delivery "identify only the states which have sufficient contact with the policy and the parties that their laws *can* be applied." *Albany Ins.*, 927 F.2d at 891. The "greatest interest" rule will determine, from among those states, which state's law *should* be applied. *Id.* In other words, "[a] federal court in a marine insurance dispute must apply the first two rules to isolate the 'eligible' states; of these states, the court then must determine which state has 'the greatest interest in the resolution of the issues.'" *Id.* (quoting *Truehart*, 884 F.2d at 226).

Employing the *Albany* two-step analysis, the only "eligible states" are California (where the performance bond was delivered and executed), and Costa Rica (where the bond was drawn up and issued). Under the first two rules, Oregon and Washington have had no contacts whatever with the performance bond: The Fifth Circuit's test eschews any inquiry into the place of performance or the location of the parties.

[16] The Restatement, however, determines applicable law by identifying "the state which . . . has the most significant relationship to the transaction and the parties . . . ." *Restatement (Second) of Conflict of Laws* § 188(1) (1971). In making this determination, the Restatement counsels consideration of (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicil, residence, nationality, place of incorporation and place of business of the parties. Under the Restatement approach, the foregoing contacts are evaluated according to their relative importance with respect to the issue in question. *Restatement* § 188(2).[7] As between the Fifth Circuit and the

[7]The Restatement provides

> In the absence of an effective choice of law by the parties . . . the contacts to be taken into account . . . to determine the law applicable to an issue include:
>
> (a) the place of contracting
>
> (b) the place of negotiation of the contract
>
> (c) the place of performance
>
> (d) the location of the subject matter of the contract, and
>
> (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.
>
> . . . .
>
> If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied

Restatement (Second) of Conflict of Laws § 188(2) and (3).

Polaris has argued that the choice of law provision in the charter party — selecting Washington as the state whose law would govern interpretation of the charter party — was incorporated by reference into the performance bond. This argument is far from convincing. The only provision in the charter party incorporated by reference into the performance bond was

Restatement, we think the Restatement's more comprehensive approach to the "most significant relationship" test will, in the long run, more appropriately serve the purposes of the choice of law rules, namely the furtherance of harmonious relations between states and the facilitation of commercial intercourse between them. *Restatement* § 6 cmt. d, § 188 cmt. b.

[17] Using the Restatement approach, California, Oregon, Washington and Costa Rica all have had significant contacts with the performance bond: Polaris is a Costa Rica resident, and drew up and issued the bond in San Jose, Costa Rica. Banks is a California resident, and he executed the bond in California. Aqua-Marine, for whose benefit the bond was executed, is an Oregon resident. Polaris was, in case of default, to perform Banks' obligation to redeliver the vessel in Washington, by sailing the barge to its home port in Everett.

[18] Of these three states, Oregon has a considerably greater interest in the application of its insurance code than do either California or Washington: Oregon has a strong interest in the protection of its citizens, including Aqua-Marine, against the insolvency of a foreign insurer. No citizen of Washington was a party to or beneficiary of the contract at

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the date for final payment of charter hire: Paragraph 3 of the bond provides that "[a]ny suit under this bond must be instituted before the expiration from [sic] the date on which final payment under the contract falls due. Contract incorporate [sic] into this bond by reference." Nowhere else in either document is any provision of one incorporated into the other. Counsel for Polaris suggested at oral argument that the comma between the words "due" and "Contract" was a typographical error, and that the word "Contract" was intended to be the first word of an independent sentence incorporating the whole of the charter party into the performance bond. This argument is vitiated by the fact that the word "Contract" appears capitalized throughout the text of the bond. Even were it otherwise, the principle *contra proferentem* would require the ambiguity created by the alleged error to be resolved against Polaris, the drafter of the bond. The parties to the performance bond did not, therefore, make an effective choice of law with respect to the bond.

issue. Likewise, California's interest in enforcing the obligations of Polaris (a Costa Rica corporation) which, under the terms of its bond, operate in favor of Aqua-Marine does not appear to be of any substance: California's citizen, Michael Banks, apparently elected not to defend himself against Aqua-Marine or Polaris, and the district court entered a default judgment against him on September 7, 1995. If Banks himself was not moved to assert his rights in this matter, California's interest in the resolution of the dispute must be correspondingly minimal. Finally, although Costa Rica might have a substantial interest in applying its own laws, its citizen, Polaris, has never argued that Costa Rica law should apply.

[19] Oregon is, therefore, the state with the greatest interest in the resolution of this action to enforce a contract. *Albany Ins.*, 927 F.2d at 891; *Gulf Tampa Drydock Co. v. Great Atl. Ins. Co.*, 757 F.2d 1172, 1174 (11th Cir. 1985); *Barber v. Chatham*, 939 F. Supp. 782, 786 (D. Haw. 1996).

[20] The district court's determination that Oregon's insurance statutes applied to Aqua-Marine's action against Polaris was therefore correct. All that remains is the question whether the district court interpreted those statutes correctly.

C. The Oregon Insurance Code

[21] Oregon's Insurance Code, Or. Rev. Stat. chs. 731-35, 737, 743-44, 746, 748, 850-51, applies to all persons who "transact insurance in this state or relative to a domestic risk . . . ." Or. Rev. Stat. § 731.022. "Insurance" within the meaning of Oregon's insurance code includes a contract whereby one undertakes to pay either a specified or ascertainable sum of money to, or to confer a benefit upon, another, upon a determinable risk or contingency. Or. Rev. Stat. § 731.102(1). The performance bond in the present appeal in effect insured Plaintiff-Respondent Aqua-Marine against Michael Banks' failure to make proper redelivery of the subject oceangoing barge at Everett, Washington. Polaris did therefore make an

insurance contract, thereby "transacting insurance." Or. Rev. Stat. § 731.146(1)(a).

[22] The risk covered by the performance bond was the risk that Banks would fail to redeliver the barge to Aqua-Marine at the termination of the charter period. Redelivery was to be made at Everett, Washington, the barge's home port. In default of proper and timely redelivery by Banks, Polaris obligated itself to make that redelivery. In no sense was the risk a "domestic risk:" An insurer "transacts insurance relative to a domestic risk" only where the subject of the insurance resides, is located, or will be performed in Oregon. Or. Rev. Stat. § 731.086. Here, the only subject of the performance bond was the redelivery of the barge at Everett, Washington. The Aqua 242 resides in Washington, and was at no relevant time located in Oregon. The subject of the insurance does not reside in Oregon. It was not located in Oregon. It was not to be performed in Oregon. Unless Polaris "transacted insurance" *in Oregon*, Oregon's insurance code does not apply to the performance bond.

Polaris undeniably "made" an insurance contract. *See* Or. Rev. Stat. § 731.146(1)(a). The question remains, however, whether it did so *in Oregon;* Polaris drew its policy in Costa Rica, issued it in Costa Rica, and mailed it to Michael Banks in California, whereupon Banks executed the policy and forwarded it to Aqua-Marine. Polaris did not take or receive any application for insurance in Oregon, collect any premium in Oregon, advertise in Oregon, or employ any Oregon agent. *See* Or. Rev. Stat. § 731.146(1).

[23] But the performance bond was executed entirely for the benefit of an Oregon resident corporation; by its terms Polaris expressly bound itself to Aqua-Marine. The fact that the subject barge is home-ported in Washington, rather than in Oregon, is not dispositive, nor is the fact that Polaris did not technically issue or deliver any policy in Oregon. By underwriting a marine risk in favor of an Oregon resident,

Polaris did in fact transact insurance business "in Oregon." Any other determination would constitute a wholly unjustified and excessively formalistic reading of the statute which applies Oregon's insurance code to persons who "transact insurance in this state or relative to a domestic risk." Or. Rev. Stat. § 731.022.

[24] Oregon's insurance code prohibits the transaction of insurance except as authorized by a certificate of authority issued to the insurer by the state's Director of Insurance. Or. Rev. Stat. § 731.354. Polaris admits it obtained no such certificate; Polaris was therefore an "unauthorized insurer" under Oregon's insurance code. Or. Rev. Stat. § 731.066(2). In Oregon, before an unauthorized insurer may file any pleading in an action against it, the defendant insurer must either (1) procure a certificate of authority or (2) deposit with the clerk of the court cash, securities, or a bond, sufficient to secure the payment of any judgment which may be entered against the insurer in the action. Or. Rev. Stat. § 746.340(1).

[25] This requirement, however, does not apply in an action against an unauthorized insurer "arising out of any policy of . . . wet marine and transportation insurance." Or. Rev. Stat. § 746.360(1). Polaris has argued, both in the lower court and in the present appeal, that the performance bond was a wet marine and transportation insurance policy as defined in Oregon's own insurance code.

[26] Under Oregon's insurance statutes, "wet marine and transportation insurance" is a subset of general marine transportation insurance. Or. Rev. Stat. § 731.194. Therefore, it first must be determined whether the surety bond sued on herein can come within the statutory definition of general marine insurance.

[27] Under the Oregon Insurance Code, "marine and transportation insurance" includes:

(1) Insurance against any and all kinds of loss of or damage to:

(a) Vessels, craft, aircraft, cars, automobiles and vehicles of every kind, as well as goods, freights, cargoes, merchandise, effects, disbursements, profits, moneys, bullion, precious stones, securities, choses in action, evidences of debt, valuable papers, bottomry and respondentia interests and all other kinds of property and interests therein, in respect to, appertaining to or in connection with any and all risks or perils of navigation, transit or transportation, including war risks, on or under any seas or other waters, on land or in the air, or while being assembled, packed, crated, baled, compressed or similarly prepared for shipment or while awaiting the same or during any delays, storage, transshipment, or reshipment incident thereto, including marine builders' risks, and all personal property floater risks including bailees' customers risks;

(b) Person or to property in connection with or appertaining to a marine or inland marine, transit or transportation insurance, including liability for loss of or damage to either, arising out of or in connection with the construction, repair, operation, maintenance or use of the subject matter of such insurance (but not including life insurance or surety bonds nor insurance against loss by reason of bodily injury to the person arising out of the ownership, maintenance or use of automobiles): . . . .

> (2) Marine protection and indemnity insurance meaning insurance against, or against legal liability of the insured for, loss, damage or expense arising out of, or incident to, the ownership, operation chartering, maintenance, use, repair or construction of any vessel, craft or instrumentality in use in ocean or inland waterways, including liability of the insured for personal injury, illness or death or for loss of or damage to the property of another person.

Or. Rev. Stat. § 731.174.

Unless the bond constitutes a contract of "marine and transportation insurance" under Section 174, it cannot be deemed a "wet marine" insurance contract under Section 194.

Subsection 1(a) of the general "marine and transportation insurance" statute enumerates no fewer than twenty specific categories of things, insurance against loss of or damage to which is marine insurance. These are, generally, modes of conveyance (boats, cars, planes), goods and cargo, media of exchange (cash, bullion), gems, financial documents ("evidences of debt," securities), choses in action, and maritime hypothecations (respondentia and bottomry interests). The general term which follows the statutory enumeration of the foregoing categories of things is "all other kinds of property and interests therein."

To conclude that the bond meets the definitions in Section 174(1)(a) would violate the principle *ejusdem generis*. Where general words follow the enumeration of specific classes of things, the general words must be construed as restricted to things of the same type as those specifically enumerated. *State v. Brantley*, 271 P.2d 668, 672 (Or. 1954); *Skinner v. Keeley*, 615 P.2d 382, 385 (Or. Ct. App. 1980); 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.17, at 188-90 (5th rev. ed. 1992). The rule derives from the recognition that "if the

legislature had intended the general words to be used in their unrestricted sense they would have made no mention of the particular classes." *Brantley, id.*

The principle *ejusdem generis* requires the phrase "all other kinds of property and interests therein" to be interpreted to include only objects similar in nature to those objects enumerated by the preceding specific words. *Id.*; *Sutherland, id.* § 47.17. The subject of the surety bond at issue in the present appeal — timely redelivery of the barge at the conclusion of the charter period — is simply so unlike any of the things enumerated in subsection 1(a) that it cannot reasonably be said to be included in the catchall. In addition, surety bonds are explicitly excluded from the types of contracts defined as maritime insurance in subsection 1(b).

Subsection 2 of the statute includes, in its list of types of contracts declared to be marine and transportation insurance, "insurance against . . . legal liability of the insured for . . . expense arising out of, or incident to . . . operation chartering . . . of any vessel . . . ." Or. Rev. Stat. § 731.174(2). The language of the surety bond itself precludes a finding that the bond purchased by Mike Banks from Polaris Insurance insured Banks against his liability for failure to redeliver the barge. The bond only guarantees performance of Banks' obligations under the charter party in the event of a default by Banks; it does not, in the event of such a default, absolve Banks of any liability under the charter party.[8] And the clause

[8]The operative paragraph of the bond provided as follows:

> NOW THEREFORE, the condition of this obligations is such that, if the Charterer shall faithfully perform the contract on its part and shall fully indemnify and save harmless the owner from all liability, cost, damage, expense, and attorney's fees which it may suffer by reason of the Charterer's failure to do so, and shall fully reimburse and repay the Owner for the outlay and expense which the Owner may incur in making good any such default, then this obligation shall by [sic] null and void, otherwise, to remain in full force and effect subject however to the conditions set forth herein.

in the charter party requiring Banks to obtain the guarantee bond explicitly provided that "[t]his bond does not release Charterer from payment schedules as set forth elsewhere herein."

[28] In sum, the surety bond is not "marine and transportation insurance" under any of the definitional subsections of Or. Rev. Stat. § 731.174. "Wet marine and transportation insurance" is a subset of "marine and transportation insurance." Or. Rev. Stat. § 731.194. Because the bond is not "marine and transportation insurance" within the meaning of Section 174, it cannot be "wet marine and transportation insurance" under Section 194. Aqua-Marine's civil action against Polaris Insurance on the bond is thus not one "arising out of any policy of . . . wet marine and transportation insurance." Or. Rev. Stat. § 746.360(1). Polaris may not invoke Section 360's "wet marine" exemption from the litigation bond requirement contained in Or. Rev. Stat. § 746.340(1).

Conclusion

[29] We therefore hold (1) that the section of Oregon's insurance code requiring foreign insurers to post a litigation bond is not preempted by federal maritime law; (2) that the performance bond executed by Polaris and Banks in favor of Aqua-Marine is a maritime contract justifying the exercise of federal admiralty jurisdiction; (3) that therefore the choice of substantive law to be applied is governed by federal maritime choice of law rules; (4) that as between the States of California, Washington and Oregon, and the Republic of Costa Rica, Oregon is the state with the greatest interest in the outcome of this action, and so its insurance code applies; and (5) that the surety bond is not a contract of marine insurance, so that Polaris is obliged under Oregon law to post bond before appearing in an action against it arising out of an insurance contract relative to an Oregon risk. The district court properly ordered Polaris to post the litigation bond required by the state statute. The judgment of the district court is therefore ***AFFIRMED.***

APPENDIX B- OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON FILED DECEMBER 4, 1993

UNITED STATES DICTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 90-3076 FR

POLARIS INSURANCE COMPANY, LTD.

Petitioner.

AQUA-MARINE CONSTRUCTORS, INC.

Respondent,

OPINION BELOW

FRYE, Judge:

The matter before the court is the motion of plaintiff, Aqua-Marine Constructors, Inc., for an order requiring defendant Polaris Insurance Company, Ltd. to deposit collateral pursuant to O.R.S. 746.340(1)(b) (#30).

FACTS

Plaintiff, Aqua-Marine Constructors, Inc. (Aqua-Marine), is the owner of an ocean-going cargo barge known as Aqua 242, which is "home-ported" at Portland, Oregon. On or about May 16, 1992, Aqua-Marine and defendant Mike Banks, dba Mike Banks Company (hereinafter, Banks), entered into a bare-boat charter agreement for the chartering of the barge, Aqua 242 (the charter agreement). Under the terms of the charter agreement, BAnks provided Aqua-Marine with a performance bond, guaranteeing performance of the payments

and the redelivery of the barge pursuant to the requirements of the charter agreement. At the request of Banks, defendant Polaris Insurance Company, Ltd. (Polaris) issued the performance bond to Aqua-Marine as obligee. After the performance bond was issued and Banks took possession of the barge, Banks breached the terms of the charter agreement. As a result, Aqua-Marine asserted a claim on the performance bond issued by Polaris for damages resulting from the breach by Banks. The performance bond is in the sum of $100,000.

CONTENTIONS OF THE PARTIES

Aqua-Marine contends that the Oregon Insurance Code is applicable, and therefore Polaris is required to deposit collateral with the court prior to filing any pleading in this case. Polaris argues that the claim of Aqua-Marine on the performance bond issued by Polaris is subject only to the admiralty jurisdiction of this court, rather than to the diversity jurisdiction of this court, and therefore federal maritime law applies rather than the Oregon Insurance Code.

Polaris further argues that if the court rules that the Oregon Insurance Code applies, Polaris is not required to deposit collateral under O.R.S. 746.340 because 1) Polaris did not perform any acts which constituted the transaction of insurance in the State of Oregon under O.R.S. 746.320(2); 2) the performance bond issued by Polaris is "wet marine and transportation insurance" under O.R.S. 731.194, and therefore Polaris need not deposit collateral with this court; 3) Polaris has deposited collateral for the benefit of the State of West Virginia; and 4) Aqua-Marine has failed to make a prima facie case for damages.

ANALYSIS AND RULING

1. The Application of the Oregon Insurance Code

This court exercises its admiralty jurisdiction when a bond is considered a "maritime contract." Benedict on Admiralty, Vol. 1, § 182 (7th Ed. 1992). A maritime contract is:

> In general, a contract relating to a ship in its use as such, or to commerce or navigation on navigable waters, or to transportation by sea or to maritime employment is subject to maritime law . . .
>
> A contract is not considered maritime merely because the services to be performed under the contract have reference to a ship or to its business, or because the ship is the object of such services or that it has reference to navigable waters.

Id. Polaris cites Greenslate v. Tenneco Oil Co., 623 F. Supp. 573 (E.D. La. 1985), to support its position that the performance bond that Banks provided Aqua-Marine constitutes a maritime contract. In Greenslate, the court held that where a charter agreement contains an indemnity clause for the benefit of a third party, a suit concerning that indemnity clause is governed by federal maritime law. Id. at 576. This case does not concern a charter agreement which contains an indemnity clause. This case concerns a performance bond which was issued collateral to the charter agreement. Benedict on Admiralty states the rule:

> Another principle for determining maritime jurisdiction is that a non-maritime contract does not acquire a maritime character and is not ordinarily cognizable in admiralty merely becuase it is collateral to a maritime contract. For example, a bond securing the performance of a charter party is not a maritime contract for purposes of admiralty jurisdiction, although the charter party itself is a maritime contract; the surety on the bond neither promises performance of the charter party nor is he authorized to do so; his obligation is merely

> to pay damages in the event of non-performance.

Id. at Vol. 1 § 183 (emphasis added and footnotes omitted). The performance bond issued by Polaris is a traditional contract of suretyship, not a maritime contract. These facts are insufficient to invoke the maritime jurisdiction of this court.

Even if the performance bond was a maritime contract, federal maritime law would not preempt the application of the Oregon Insurance Code under Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955). In Wilburn Boat Co., the United States Supreme Court held that in the field of Marine Insurance, if there is no existing federal rule, the courts will, like Congress, leave the regulation of marine insurance to the states. Id. at 313-14.

Polaris has not cited any federal statute, regulation or case relating to marine performance bonds which would justify preemption of Oregon's Insurance Code. Therefore, even if this court exercised its maritime jurisdiction, Polaris would be bound by O.R.S. 746.340.

2. The Application of O.R.S. 746.340

O.R.S. 746.340 imposes several conditions on the transaction of business in the State of Oregon by "unauthorized insurers." O.R.S. 746.340 states, in relevant part:

> (1) [B]efore any unauthorized insurer may file or cause to be filed any motion or pleading in an action started against it by service of process in the manner provided in ORS 746.320, the defendant insurer shall either:
>
> (a) Procure a certificate of authority to transact insurance in this state; or
>
> (b) Deposit cash or securities or file a bond with good and sufficient sureties, approved by the court, with the clerk of the

> court in which such action is pending in an amount, fixed by the court, sufficient to secure the payment of any judgment which may be entered in such action.

Paragraph (1) of O.R.S. 746.340 requires that Aqua-Marine establish two facts: 1) that Polaris is an "unauthorized insurer;" and 2) that Polaris was properly served in a manner authorized by O.R.S. 746.320.[1]

O.R.S. 731.066 defines an "unauthorized insurer" as an insurer not authorized by a subsisting certificate of authority to transact business in the State of Oregon. Because Polaris has not acquired a certificate of authority to transact business in the State of Oregon from the State of Oregon, Polaris is an "unauthorized insurer."

The second fact that Aqua-Marine must establish under O.R.S. 746.340 is that the service of process was proper as provided by O.R.S. 746.320. Under O.R.S. 746.320, the Director of the Department of Insurance is deemed to be the attorney for the unauthorized insurer upon whom all process may be served in any action involving a foreign insurer which performs certain acts of transacting business in the State of Oregon. O.R.S. 746.320(5) expressly provides that "[n]othing contained in this section shall limit or abridge the right to serve any process upon an insurer in any other manner than permitted by law." In an opinion and order dated July 14, 1993, this court determined that Polaris was properly served in this action under Fed. R. Civ. P. 4(i)(1)(C). Because O.R.S. 746.320(5) expressly authorizes any legally sufficient method of service of process, Aqua-Marine has satisfied the service requirements of O.R.S. 746.340.

Polaris argues that O.R.S. 746.340 does not apply in this action despite proper service of process because Polaris did not perform any of the acts required under O.R.S. 746.320(2). Although O.R.S. 746.320 is not clear on its face,

---

the requirements of O.R.S. 746.320(2) appear to be a prerequisite to satisfactory service of process by any method described by O.R.S. 746.320(5). Acts qualifying under O.R.S. 746.320(2) include:

> (a) Issuing or delivering policies of insurance to persons residing or authorized to do business in this state.
>
> (b) Soliciting applications for policies of insurance from such persons.
>
> (c) Collecting premiums, membership fees, assessments or other considerations under policies of insurance from such persons.
>
> (d) Any other transaction of business arising out of policies of insurance with such persons.

Aqua-Marine argues that when Polaris issued the performance bond to Aqua-Marine as an obligee on behalf of Banks, it satisfied O.R.S. 746.320(2)(a). Polaris argues that even though Aqua-Marine is a resident of the State of Oregon, Banks is not a resident of the State of Oregon; therefore, the bond was not issued to an entity residing in the State of Oregon. The residency of Banks is not relevant to O.R.S. 746.320(2)(a). The court concludes that it is sufficient that Polaris entered into a three-party agreement acting as an obligor-surety, issuing a performance bond to an Oregon obligee (Aqua-Marine) on behalf of an out of state principal (Banks). Therefore, Polaris has performed one of the enumerated acts and has been properly served under O.R.S. 746.320.

3. Exemption under O.R.S. 746.360(1)

O.R.S. 746.360(1) exempts "wet marine and transportation insurance" from the requirements of O.R.S. 746.340. Wet marine insurance is defined by O.R.S. 731.194(1) as "[i]nsurance upon vessels, crafts, hulls and of interests therein or with relation thereto." Polaris argues that the performance bond is wet marine insurance.

The performance bond issued to Aqua-Marine is a three-party contract which includes the surety's right of reimbursement against its principal in the event of loss or of a claim being filed on the bond. The elements contained in the performance bond are in contrast to other forms of indemnity contracts normally considered wet marine insurance, such as hull insurance, P & I insurance, and other traditional forms of inland marine and wet marine policies. The performance bond does not qualify for exemption from the obligations of O.R.S. 746.340 as wet marine insurance.

4. The Obligations of Polaris under O.R.S. 746.340

Polaris contends that it need not deposit cash or file a bond with the clerk of this court because it has an account in the State of California. This account was established within the guidelines of the National Association of Insurance Companies and contains one million dollars in securities. Under O.R.S. 746.340(1)(b):

> the court may in its discretion make an order dispensing with such deposit or bond where the insurer makes a showing satisfactory to such court that the insurer maintains in a state of the United States funds or securities, in trust or otherwise, sufficient and available to satisfy any final judgment which may be entered in such action.

The evidence presented to the court indicates that the funds in the account maintained by Polaris in the State of California are specifically set aside to guarantee payment of claims in the State of West Virginia. Because the funds are dedicated to the

payment of claims in the State of West Virginia, Polaris has not satisfactorily established that these funds are available to satisfy any final judgment in this action for the benefit of this plaintiff, Aqua-Marine.

CONCLUSION

For the foregoing reasons, the motion of Aqua-Marine for an order requiring Polaris to deposit collateral pursuant to O.R.S. 746.340(1)(b) (#30) is granted. Polaris is ordered to deposit cash or securities or file a bond with good and sufficient sureties with the clerk of this court in the amount of $150,000.

DATED this 9th day of December, 1993.

S/ HELEN J. FRYE
HELEN J. FRYE
United States District
Judge

APPENDIX C- OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON FILED AUGUST 1, 1994

UNITED STATES DICTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 90-3076 FR

POLARIS INSURANCE COMPANY, LTD.

Petitioner.

AQUA-MARINE CONSTRUCTORS, INC.

Respondent,

OPINION BELOW

FRYE, Judge:

The matter before the court is the issue of contempt arising from the motion of , Aqua-Marine Constructors, Inc., for an order to show cause why Polaris Insurance Company, Ltd. (Polaris) should not be held in contempt. In addition to a finding of contempt, Aqua-Marine seeks an order imposing (1) a daily fine against Polaris until it deposits collateral, (2) A fine of $356.00 for attorney fees and $20.74 for costs; and (3) the costs of the contempt proceeding.

Polaris argues that the court dose not have the power to hold Polaris in conrtempt. Polaris contends that O.R.S. 746340(1) restricts the limits the relief that may be granted Aqua-Marine to an order of the court from filing any motions, pleadings or papers going to the merits of the case.[1] However nothing in

O.R.S. limits the contempt power of this court. The power to hold Polaris in Contempt is an inherent power of the court and is not curtailed by O.R.S. 746.340(1). Accordingly this court finds that Polaris is in contempt of the order of this court dated June 22, 1992; that Polaris had 22 days of this opinion to purge itself of this contempt by depositing collateral and paying the attorney fees and costs of Aqua-Marine relating to the contempt proceeding;

and that if Polaris fails to purge itself ot the contempt of the order of this court within twenty dauys from the date of this opinion, Polaris will be prohibited from filing any further motions, pleadings or papers going to the merits of this controversy.

Dated this _1_ day of August, 1994.

S/ HELEN J. FRYE
HELEN J. FRYE
DISTRICT COURT JUDGE

APPENDIX D- ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON FILED DECEMBER9, 1993

UNITED STATES DICTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 90-3076 FR

POLARIS INSURANCE COMPANY, LTD.

Petitioner.

AQUA-MARINE CONSTRUCTORS, INC.

Respondent,

ORDER BELOW

IT IS HEREBY ORDERED that plaintiff's motion for an order requiring Polaris Insurance Company to deposit collateral pursuant to O.R.S. 746.340(1)(b) (#30) is GRANTED. Polaris Insurance Company, Ltd. is ordered to deposit cash or securities or file a bond with good and sufficient sureties with the clerk of this court in the amount of $150,000.

DATED this 9th day of December, 1993.

S/ HELEN J. FRYE
HELEN J. FRYE
United States District Judge

APPENDIX E- ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON FILED AUGUST 1, 1995

UNITED STATES DICTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 90-3076 FR

POLARIS INSURANCE COMPANY, LTD.

Petitioner.

AQUA-MARINE CONSTRUCTORS, INC.

Respondent,

ORDER BELOW

FRYE, Judge:

On July 18, 1994 the court held a hearing on the issue of contempt arising from the motion of Aqua-Marine Constructors (Aqua-Marine) for an order requiring Polaris to show cause whu it should not be held in contempt of this court's order of June 22, 1992. Polaris appeared and argued its cause before this court. The court, having heard the matter, inertes the following order:

(1) Polaris is found in contempt of this court's order of June 22, 1992;

(2) Polaris has twenty days from the date of this order to purge itself of this contempt by depositing collateral and paying the attorney's fees and costs of Aqua-Marine relating to the contempt proceeding; and

(3) If Polaris fails to purge itelf of the contempt of the order of this court within tewnty days from the date of this order,

Polaris will be prohibited from filing any further motions, pleadings or papers going to the meritws of this controversy.

IT IS SO ORDERED.

DATED this 1 day of August, 1994

S/ HELEN J. FRYE
HELEN J. FRYE
UNITED STATES
DISTRICT COURT JUDGE

APPENDIX F- ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON FILED SEPTEMBER 4, 1995

UNITED STATES DICTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 90-3076 FR

POLARIS INSURANCE COMPANY, LTD.

Petitioner.

AQUA-MARINE CONSTRUCTORS, INC.

Respondent,

ORDER BELOW

FRYE, JUDGE:

This matter having come before the court on Plaintiff's motion for summary judgment, alteratively, entry of judgment, it appears from the records and files herein that defendant Polaris Insurance Company, Ltd. is barred from filing any further motions, pleadings, or papers going to the merits of this proceeding;

It further appearing that plaintiff Aqua-Marine Constructors, Inc. has made a prima facie case for a breach of contract; and

The court having entered an order for entry of judgment against defendant and finding generally in favor of plaintiff and against defendant plaintiff's complaint;

Now it is hereby

ORDERED AND ADJUDGED that plaintiff have judgment against defendant Polaris Insurance Company, Ltd., as detailed below.

MONEY JUDGMENT

1. The judgment creditor is Aqua-Marine Constructors, Inc. which is represented by Kent C. Roberts and Darien S. Loiselle.

2. The judgment debtor is Polaris Insurance Company.

3. The principal amount of the judgment is S235,,204.52.

4. Prejudgment interest in the amount of S98,189.50 is owed through March 31, 1995, on a balance of S235,204.52, compounded annually at 18% per annum S12,063.09.

5. Pre judgment interest between July 14, 1995 and the date of judgment shall accrue at $115,99 per day

6. The judgment creditor is also owed post-judgment interest at a rate of 18% compounded annually.

7. The money judgment also includes an award of costs and disbursements and reasonable attorney's fees of $22,198.00

Dated this 6 day of September, 1995.

S/ HELEN J. FRYE
HELEN J. FRYE
UNITED STATES DISTRICT
COURT JUDGE

APPENDIX G- ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON FILED SEPTEMBER 6, 1995

UNITED STATES DICTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 90-3076 FR

POLARIS INSURANCE COMPANY, LTD.

Petitioner.

AQUA-MARINE CONSTRUCTORS, INC.

Respondent,

ORDER BELOW

FRYE, JUDGE:

The court having entered an order for entry of judgment against defendant and finding generally in favor of plaintiff and against defendant plaintiff's complaint;

Now it is hereby

ORDERED AND ADJUDGED that plaintiff have judgment against defendant Polaris Insurance Company, Ltd., as detailed below.

MONEY JUDGMENT

1. The judgment creditor is Aqua-Marine Constructors, Inc. which is represented by Kent C. Roberts and Darien S. Loiselle.

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5. Pre judgment interest between July 14, 1995 and the date of judgment shall accrue at $115,99 per day

6. The judgment creditor is also owed post-judgment interest at a rate of 18% compounded annually.

7. The money judgment also includes an award of costs and disbursements and reasonable attorney's fees of $22,198.00

Dated this 6 day of September, 1995.

S/ Helen J. Frye
HELEN J., FRYE
United States District Judge

APPENDIX H - AFFIDAVIT OF MARY ALICE BJORK FILED WITH THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON ON NOVEMBER 9, 1993

UNITED STATES DICTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 90-3076 FR

POLARIS INSURANCE COMPANY, LTD.

Petitioner.

AQUA-MARINE CONSTRUCTORS, INC.

Respondent,

OREGON NOVEMBER 9, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

AFFIDAVIT OF MARY ALICE BJORK

STATE OF OREGON)
) SS
COUNTY OF MARION)

I, Mary Alice Bjork, being first duly sworn, depose and say:

1. I am the Administrator if the Insurance Division, Oregon Department of Consumer and Business Services ("Oregon Insurance Division") the State Agency

charged by the Oregon Code. ORS Chapters 731-752. ORS 731.016

2. The Oregon Insurance Division has examined the document attached to this affidavit entitled "PERFORMANCE BOND BOND NO. 92-050515107 (the document marked Exhibit 2") This document sets forth and includes the fundamental elements of a traditional suretyship contract, namely a three-party agreement between a principal (Mike Banks Co.) an obligee (Aqua-Marine Constructors Inc.) and a surety obligor Polaris Insurance Company, Ltd. The document also includes at (at page 2, clauses 5 of the sureties traditional right of reimbursement against its principal in the event of loss or claim of the bond. The document also sets forth a series of alternative remedies available to the surety in the event of a fault on the underlying contract (the bare boat charter) by the principal, Mike Banks Co.

3. All of these elements of a traditional suretyship contract, present in the attached performance bond, Exhibit 2, of indemnity insurance contracts (such as Hull Insurance, P&I Insurance and other traditional forms of Inland Marine Insurance and wet marine insurance policies.

4. The Oregon Insurance Division therefore concludes that the attached Performance Bond, bond Mo. 92-0515107 (marked) Exhibit 2) is "Surety Insurance" as defined RS 731.186. The attached bond, is not "marine and transportation insurance" defined at ORS 731.174, nor is it "wet marine and transportation insurance" as defined in ORS 731.194.

S/Mary Alice Bjork
Mary Alice Bjork

SUBSCRIBED AND SWORN to before me this 9th day of November, 1993.

S/Linda Greene
OFFICIAL SEAL OF NOTARY
Linda J. Greene
NOTARY PUBLIC OREGON
COMMISSION MO. 023118
MY COMMISSION EXPIRES MAR. 22, 1997

NOTARY PUBLIC FOR OREGON
My Commission Expires 3-22-97